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IN THE

Supreme Court of the United States

JASON LANDIS LINDER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Does the doctrine of collateral estoppel bar consideration of a claim in a petition filed pursuant to 28 U.S.C. § 2255 if there was no prior ruling on the merits of that claim?

(2) Do the holdings of *Day v. McDonough*, 547 U.S. 198 (2006), apply to a petition filed pursuant to 28 U.S.C. § 2255?

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PETITION FOR A WRIT OF CERTIORARI

Jason Landis Linder respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals affirming the denial of Petitioner's 28 U.S.C. § 2255 petition is published and reported at *United States v. Linder*, 552 F.3d 391 (4th Cir. 2009) and is reproduced in the Petition Appendix ("App.") at App. 1a-13a. The order denying rehearing *en banc* as well as the opinion dissenting from the denial of rehearing *en banc* is published and reported at *United States v. Linder*, 561 F.3d 339 (4th Cir. 2009) and is reproduced at App. 27a-41a. The opinions of the district court (Jackson, J.) denying Petitioner's 28 U.S.C. § 2255 petition and his Motion to Alter or Amend Judgment are unpublished and are reproduced at App. 17a-22a. The opinion of the court of appeals dismissing Mr. Linder's direct appeal is unpublished and reported at *United States v. Linder*, 174 Fed. App'x. 174 (4th Cir. 2006), and is reproduced at App. 23a-26a.

JURISDICTION

The court of appeals denied the petition for rehearing *en banc* on March 24, 2009. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The following statutory provision is set forth in relevant part in the Appendix hereto at 42a: Title 28, United States Code, Section 2255(a).

STATEMENT OF THE CASE

This case involves the announcement of a new bar to collateral relief for petitioners who were convicted in federal court. In an exercise of its supervisory powers, the court of appeals discarded an essential element of the collateral estoppel doctrine: the requirement that there be a prior ruling on the merits. As a result, petitioners who file § 2255 petitions in the Fourth Circuit now are barred from litigating any claim that was dismissed beforehand – even if there was no prior ruling on the merits of that claim.[1] The effect of this Litigation Bar is that any defendant who waives the right to a direct appeal will also be barred from litigating claims in a § 2255 petition. The court of appeals applied this new Litigation Bar even though the Respondent waived any such bar by failing to raise it in the district court. This case raises two significant questions regarding the promulgation of a new procedural bar to federal collateral relief, and the requisite process that must accompany the adoption and application of a new procedural bar in the face of a waiver by the Government.

First, in myriad decisions regarding the doctrine of collateral estoppel, including *Gear v. Parish*, 46 U.S. 168,

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[1] We refer to this new rule as the "Litigation Bar."

170 (1847) and *Cromwell v. County of Sac*, 94 U.S. 351 (1876), this Court has held that this bar on relitigation only applies if there was a prior decision on the merits. Yet, the ruling from the court of appeals disregarded this longstanding element of collateral estoppel and split from the overwhelming conclusion of the other courts of appeals. Now, under the Litigation Bar, a prior procedural dismissal bars litigation of a claim in a § 2255 petition. As a practical matter, if dismissal based on a direct appeal waiver bars litigation of a claim in a § 2255 petition, then any petitioner who waived a direct appeal will also be barred from litigating a collateral challenge. For instance, if the petitioner had failed to raise the claim on direct appeal, then the claim would be procedurally defaulted. If, on the other hand, a petitioner did raise the claim in a direct appeal – as Mr. Linder did – only to have the claim dismissed based on a direct appeal waiver, the petitioner now would be barred from litigating the claim in a § 2255 petition. This Court should grant certiorari to resolve the direct conflict between the decision of the court of appeals and this Court's decisions on collateral estoppel, especially because (1) the ruling significantly restricts access to § 2255 relief and (2) the collateral estoppel doctrine falls under this Court's supervisory powers.

Second, the Respondent did not assert a collateral estoppel bar when the district court considered Mr. Linder's § 2255 petition, and it thus waived this affirmative defense. *See Blonder-Tongue Labs., Inc. v. University of Illinois Foundation*, 402 U.S. 313, 350 (1971) ("Res judicata and collateral estoppel are affirmative defenses that must be pleaded."). In addition, collateral estoppel also was not: (1) identified in the certificate of appealability; (2) raised at oral

argument; (3) or otherwise identified by the court of appeals for briefing by the parties. In *Day v. McDonough*, 547 U.S. 198 (2006), a ruling in the § 2254 context, this Court restricted the circumstances in which a statute of limitations defense could be raised by a court if not raised by a State. This Court should grant certiorari to determine whether the restrictions and procedural safeguards imposed in *Day* for § 2254 petitions also apply to § 2255 petitions and whether the court of appeals erred in failing to follow *Day*.

This case presents a strong vehicle to resolve these issues. If Mr. Linder's *Booker* claim is successful, Mr. Linder's sentence will be 12 years shorter than the sentence he is currently serving because the trial court imposed an alternative, non-Guidelines sentence, and the difference between his actual sentence and the alternative sentence is 12 years. Mr. Linder's sentence plainly violates the holding of *Booker*, and it applies to Mr. Linder's sentence because *Booker* was decided while Mr. Linder's case was pending on direct appeal. Moreover, Mr. Linder timely raised his *Blakely/Booker* argument at every level – (1) in the trial court, (2) on direct appeal, (3) in a petition for a writ of certiorari from his direct appeal, (4) in his § 2255 petition, and (5) in his direct appeal from the denial thereof – but no court has ruled on the merits of his claim. Thus, this issue is fully preserved and is ripe for decision. This court should grant certiorari to resolve these issues.

STATEMENT OF FACTS

On May 25, 2004, Jason Landis Linder pled guilty to conspiracy to possess one kilogram of heroin with intent to distribute it in violation of 21 U.S.C. §§ 841(a)(1), 846 (2006). In his plea agreement, Mr. Linder waived "the right to appeal the conviction and any sentence within the maximum provided in the statute of conviction (or the manner in which that sentence was determined)"; he did not, however, waive his right to petition for collateral relief pursuant to 28 U.S.C. § 2255.

After Mr. Linder's plea, but before his sentencing, the Supreme Court decided *Blakely v. Washington*, 542 U.S. 296 (2004), which held Washington's mandatory sentencing system unconstitutional. In the wake of *Blakely*, an *en banc* majority of the Fourth Circuit held that *Blakely* did not apply to the mandatory federal Sentencing Guidelines and so upheld their constitutionality. *United States v. Hammoud*, 381 F.3d 316, 353 (4th Cir. 2004), *vacated*, 543 U.S. 1097 (2005). However, acknowledging the uncertainty in this area, the Fourth Circuit directed that sentencing courts also "announce . . . a sentence . . . treating the guidelines as advisory only." *Id.*

At Mr. Linder's sentencing hearing on October 4, 2004, the district court found facts as to the quantity of heroin at issue in the conspiracy and Mr. Linder's role in the conspiracy, and upwardly departed three levels

under the United States Sentencing Guidelines.[2] Mr. Linder, through counsel, objected to the inclusion of sentence-enhancing information in his pre-sentence report, claiming that *Blakely* prohibited its use at sentencing, but the district court overruled that objection. In accord with the Fourth Circuit's suggestion in *Hammoud*, the district court explained that the mandatory Guidelines required a sentence of 262 months in prison, but that if "not confined by the sentencing guidelines in this case, the Court would impose a sentence in this case of 120 months." The judgment sentenced Mr. Linder to a term of 262 months, but also provided an "alternative sentence," rendered "pursuant to 18 U.S.C.A. § 3553(a)" of 120 months if the sentencing guidelines were later deemed to be advisory.

On October 14, 2004, Mr. Linder noticed a direct appeal, and on direct appeal, he argued that his Guidelines sentence was unconstitutional. While Mr. Linder's direct appeal was pending, the Supreme Court decided *Booker*. In *Booker*, this Court held that a sentence imposed under mandatory federal Guidelines and based on facts not found by a jury nor admitted by the defendant — and sentences in excess of the statutory maximum available under the facts admitted

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[2] Mr. Linder admitted facts in his plea agreement that would have justified an offense level of 32. The district court at sentencing upwardly departed four levels after finding that Mr. Linder was an organizer or leader of criminal activity that involved five or more participants, and upwardly departed two levels after finding that the amount of heroin at issue exceeded four kilograms. The district court downwardly departed three levels due to Mr. Linder's acceptance of responsibility, resulting in an offense level of 35.

by the defendant or found by a jury — violate the Sixth Amendment right to trial by jury. *See Booker*, 543 U.S. at 244. This Court made its holding in *Booker* applicable to all cases "pending on direct review or not yet final." *Id.* at 268 (*quoting Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)).

Because his case was pending on direct appeal, Mr. Linder immediately advised the court of appeals about the *Booker* decision, filing a motion to remand and citing *Booker*. On March 8, 2005, the Fourth Circuit issued an order deferring action on the motion to remand until it rendered a decision in *United States v. Blick*, 408 F.3d 162 (4th Cir. 2005), which considered whether a *Booker* claim was within the scope of a direct appeal waiver.

On April 5, 2006, the Fourth Circuit dismissed Mr. Linder's direct appeal, holding that his *Booker* claim was barred by his direct appeal waiver. *See United States v. Linder*, 174 Fed. App'x. 174, 175-76 (4th Cir. 2006) (unpublished) (Pet. App. 23-26a).[3] In its opinion, the

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[3] The Fourth Circuit was incorrect in ruling that Mr. Linder's *Booker* claim was within the scope of his direct appeal waiver. The court ruled that Mr. Linder's *Booker* claim was foreclosed by *Blick*, 408 F.3d at 170, and *United States v. Johnson*, 410 F.3d 137, 153 (4th Cir. 2005), because the claim fell within the scope of his appeal waiver. Mr. Linder agreed to waive "the right to appeal the conviction and any sentence within the maximum provided in the statute of conviction (or the manner in which that sentence was determined)." But unlike the petitioners in *Blick* and *Johnson*, who each received Guidelines sentences that were lower than the statutory maximum authorized by the admitted facts, Mr. Linder's Guidelines

(Cont'd)

Fourth Circuit acknowledged that Mr. Linder's was "challenging [his] sentence[ ] based on *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005)." App. at 24a. The Supreme Court subsequently denied certiorari. *Linder v. United States*, 549 U.S. 938 (2006). Thus, on direct appeal, Mr. Linder received no ruling on the merits of his *Booker* claim.

While Mr. Linder's petition for certiorari was pending, he filed a *pro se* "Memorandum in Aid of Sentencing" requesting that the district court impose the "alternative" ten-year sentence contained within its original judgment. The district court construed this as a § 2255 petition. On October 12, 2006, the district court denied Mr. Linder's § 2255 petition, holding that *Booker* did not apply to Mr. Linder because his "conviction was final before *Booker*."[4] App. at 21a-22a.[5]

(Cont'd)
sentence was greater than the maximum provided in the statute of conviction. Mr. Linder's statutory maximum was the highest term of incarceration that he could have received at his criminal history category for the offense detailed in his plea agreement. Under the Sentencing Guidelines, that maximum term of incarceration was lower than the 262 month sentence Mr. Linder received after the court found facts that led to offense level enhancements. Therefore, the Fourth Circuit erred when it ruled that Mr. Linder's constitutional *Booker* claim fell within the scope of his direct appeal waiver.

[4] Under established Supreme Court precedent, the district court erred in holding that Mr. Linder's conviction was final
(Cont'd)

Following a timely notice of appeal, on August 1, 2007, the court of appeals granted a certificate of appealability on: "whether the district court erred in ruling that Linder's conviction was final before *United States v. Booker*, 543 U.S. 220 (2005), and that *Booker* was not available to Linder for post-conviction relief on his Sixth Amendment claim."

After Mr. Linder filed his opening brief, the Respondent asserted, for the first time, that Mr. Linder's § 2255 *Booker* argument was barred because on direct appeal the Fourth Circuit "dismissed the very claims that he is raising now," and that Mr. Linder "may not relitigate in a § 2255 motion legal claims that he litigated and lost on direct appeal." Mr. Linder opposed this argument in his reply brief, asserting that (1) the Government had waived this collateral estoppel argument when it failed to raise it in the district court and (2) there could not be a collateral estoppel bar because there had been no prior ruling on the merits of his *Booker* claim.

(Cont'd)
before *Booker* was decided. The district court ruled that Mr. Linder's conviction was final at judgment, before *Booker*, because he had waived the right to directly appeal certain claims. However, as recognized by the Fourth Circuit in overturning the district court's ruling, Mr. Linder's conviction only became final when this Court denied his petition for certiorari, which occurred long after *Booker* had been decided. *See Clay v. United States*, 537 U.S. 522, 527 (2003) (defining when a conviction becomes final).

[6] On October 30, 2006, Mr. Linder filed a Motion to Alter or Amend Judgment under Federal Rule of Civil Procedure 59(e). On December 15, 2006, the district court denied the motion.

On January 12, 2009, the court of appeals affirmed the district court's denial of Mr. Linder's § 2255 petition on the ground that Mr. Linder "may not circumvent a proper ruling on his *Booker* challenge on direct appeal by re-raising the same challenge in a § 2255 motion."[6] App. at 12a. The court of appeals further excused the Respondent's failure to raise collateral estoppel in the district court, because, among other things, "[w]ere we not to consider the Government's waiver argument, we would effectively be reversing our prior decision on direct appeal even though its correctness has not been challenged." *Id.* at 12a n.2.

On January 26, 2009, Mr. Linder filed a Petition for Rehearing and Petition for Rehearing *En Banc*. On March 24, 2009, the court of appeals denied rehearing. The Hon. Diana Gribbon Motz, joined in dissent by the Hon. Blane Michael and Hon. Roger Gregory, filed a published opinion dissenting from the denial of rehearing *en banc*. App. 27a-41a.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition for certiorari because the opinion of the court of appeals is in conflict with decisions of this Court and other circuit courts on the important question of whether a collateral estoppel bar applies in a § 2255 petition if a claim was previously dismissed on direct appeal without a ruling on the

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[6] The court of appeals reversed on the issue identified in the certificate of appealability, holding that the district court erred in ruling that Mr. Linder's conviction was final before *Booker* was decided. App. at 10a.

merits. In Mr. Linder's case, he agreed to a provision in his plea agreement that waived his right to a direct appeal on certain claims but did not waive his right to bring any claim in a § 2255 petition.[7] In this regard, Mr. Linder is hardly alone. Indeed, the Government has increasingly demanded the inclusion of appeal waivers in plea agreements,[8] increasing the significance of the new Litigation Bar promulgated by the court of appeals.

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[7] Indeed, the Fourth Circuit correctly held that Mr. Linder's plea agreement did not waive his right to bring a collateral challenge under section 2255. The panel wrote,

> 'Applying standard contract law, we enforce a plea agreement's plain language in its ordinary sense and do not write the contracts of the parties retroactively, but merely construe the terms of the contract the parties have previously signed.' *United States v. Jordan*, 509 F.3d 191, 195 (4th Cir. 2007) (internal quotation marks and citations omitted). In the plea agreement, Linder waived only his 'right to appeal,' not his right to seek collateral review under § 2255. Of course, a collateral attack is distinct from a direct appeal. Thus, under the plain language of the plea agreement, Linder did not waive his right to file a § 2255 motion. *See United States v. Pruitt*, 32 F.3d 431, 433 (9th Cir. 1994) ('A plea agreement does not waive the right to bring a § 2255 motion unless it does so expressly. The government gets what it bargains for but nothing more.').

App. at 3a n.1.

[8] A recent study of 971 randomly selected cases sentenced under the United States Sentencing Guidelines found that in nearly two-thirds of the cases settled by plea agreement, the (Cont'd)

The new Litigation Bar is completely inconsistent with centuries of jurisprudence regarding collateral estoppel, and because this new rule was promulgated in an exercise of the court of appeals' supervisory powers, this Court should grant certiorari to review this important new limitation to § 2255 relief. As discussed, the new Litigation Bar has the effect of affording the Government more than the benefit of its bargain because it receives the benefit of a waiver of all further review rights even if the plea agreement only waives the right to a direct appeal. Given the prevalence of direct appeal waivers in plea agreements, this new rule severely restricts access to § 2255 relief for a significant number of petitioners.

In addition, in *Day v. McDonough*, 547 U.S. 198 (2006), this Court identified a number of procedural and substantive restrictions on the ability of a court to exercise its discretion to consider, *sua sponte*, a waived statute of limitations bar to a petition filed under 28 U.S.C. § 2254. Here, the Respondent failed to assert collateral estoppel or the new Litigation Bar until it

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(Cont'd)

defendants waived their rights to review. Nancy King & Michael O'Neil, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209, 209 (2005). While some petitioners waive all further review, others reserve the right to collaterally attack their sentences. *Id.* at 242-43. As the study authors note, "The observed trend of increased use of stipulations combined with no review raises the risk that sentences not in compliance with the law can proliferate without scrutiny. The uneven practice of trading sentencing concessions for waivers among cases and courts also suggests that waivers are undercutting efforts to advance consistency in federal sentencing." *Id.* at 210.

raised the argument for the first time in the responsive brief in the court of appeals. As a result, the Government plainly waived this argument. Rather than apply the *Day* analysis or any other established analysis to the determination of whether the court should excuse the waiver, the court of appeals improvised an *ad hoc*, fact-based analysis that is sure to result in future inconsistent rulings. App. at 12a n.2. Moreover, the lower courts have split on whether *Day* applies to § 2255 petitions. This Court should grant certiorari to determine whether the guidance of *Day* applies to a § 2255 petition.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT AND WITH THE DECISIONS OF THE COURTS OF APPEALS, WHICH RECOGNIZE THAT THE COLLATERAL ESTOPPEL BAR ONLY APPLIES WHEN THERE HAS BEEN A PRIOR RULING ON THE MERITS OF THE CLAIM.

For centuries, this Court has consistently held that the collateral estoppel bar applies only when the claim was previously resolved on the merits. *See Gear*, 46 U.S. at 170 ("It is true that a judgment at law is conclusive between the parties thereto when the merits have been passed upon, and unless reversed operates as an estoppel"); *see also Hubbell v. United States*, 171 U.S. 203, 209 (1898) ("We have before us only a decision upon the merits, and upon the same state of facts, of a claim identical with this, and we perceive no reason why it

should not operate as an estoppel."); *City of Aurora v. West*, 74 U.S. 82, 103 (1868) (applying estoppel when judgment was rendered on the merits). This Court continues to limit collateral estoppel only to "when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment." *Arizona v. California*, 530 U.S. 392, 414 (2000); *see also San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323, 336 n.16 (2005) (noting that collateral estoppel applies "once a court has decided an issue of fact or law necessary to its judgment"); *Allen v. McCurry*, 449 U.S. 90, 95 (1980) (determining that "collateral estoppel . . . cannot apply when the party against whom the earlier decision is asserted did not have a full and fair opportunity to litigate that issue in the earlier case") (internal quotations omitted); *Montana v. United States*, 440 U.S. 147, 154 (1979) (noting that collateral estoppel applies to those "matters that [parties] have had a full and fair opportunity to litigate"); *United States v. Int'l Bldg. Co.* 345 U.S. 502, 506 (1953) (holding collateral estoppel applies only to "matters in a second proceeding which were actually presented and determined in an earlier suit"); *Southern Pacific R.R. Co. v. United States*, 168 U.S. 1, 48 (1897) (finding collateral estoppel applicable only to a "right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction"); *Cromwell v. County of Sac*, 94 U.S. 351, 353 (1876) (noting collateral estoppel applies "only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered").

Without a prior ruling on the merits, there simply is no bar to subsequent litigation of a claim under this doctrine. For instance, more than a century ago, this Court declined to apply the collateral estoppel bar because the issue had not been "actually litigated." *See Cromwell*, 94 U.S. at 354. In *Cromwell*, a defendant sought to bar claims by a bondholder on the basis that the bondholder had failed to establish his claim on different bonds issued by the same defendant. *Id.* at 352. In those circumstance, the *Cromwell* Court refused to bar the bondholder's claim on the second set of bonds, holding, "There was nothing adjudged in the former action in the finding that the plaintiff had not made such proof in that case which can preclude the present plaintiff from making such proof here." *Id.* Similarly, in *Arizona v. California*, this Court declined to apply the collateral estoppel bar when one party attempted to rely on a consent judgment to satisfy the requirement for a prior ruling on the merits. *See Arizona*, 530 U.S. at 413-414. This Court held that an issue is not "actually litigated" such that a collateral estoppel bar applies if the prior "judgment [is] entered by confession, consent, or default." *Id.* at 414 (quoting Restatement (Second) of Judgments § 27 cmt. e (1982)). The bottom line is that there must be a prior ruling on the merits to invoke a collateral estoppel bar.

Every other court of appeals is in accord on this question. For instance, the Second, Third, Fifth, Seventh, Ninth and Tenth Circuits have held explicitly that, in this situation, the collateral estoppel bar is only triggered by a prior adjudication of a claim on its merits on direct appeal. *See Kramer v. United States*, 788 F.2d 1229, 1231 (7th Cir. 1986) ("[a]n issue previously raised on direct appeal cannot be relitigated in a Section 2255 proceeding only if the issue was resolved on the merits"); *United States v. Palumbo*, 608 F.2d 529, 533 n. 12 (3d Cir. 1979) (per curiam) ("[T]he defendant] may litigate his constitutional contention to a federal trier, take a direct appeal to a federal court of appeals; if he does and loses on the merits, there is no reason (absent a botched presentation by counsel or a claim of new evidence) to allow relitigation collaterally."); *Polizzi v. United States*, 550 F.2d 1133, 1136 (9th Cir. 1976) ("As neither manifest injustice nor a change in law is present here, dismissal is proper if petitioners are raising an issue previously determined on the merits.") (internal quotation omitted), *cert. denied*, 446 U.S. 922 (1980); *Williams v. United States*, 481 F.2d 339, 345 (2d Cir. 1973) (per curiam) (§ 2255 properly foreclosed where the court "squarely ruled on the merits"), *cert. denied*, 414 U.S. 1010 (1973); *United States v. Fennell*, 207 Fed. Appx. 916, 918-19 (10th Cir. 2006) (unpublished) ("To the extent that Fennell's petition represents an attempt to relitigate the merits of the district court's determination at sentencing, we are precluded on collateral attack from considering issues disposed of on direct appeal."); *United States v. Lutcher*, 87 F.3d 1312, 1996 WL 335550, at *1 (5th Cir. 1996) (unpublished) ("This court determined the merits of Lutcher's contentions against the instructions themselves on direct appeal; Lutcher

may not relitigate those issues."). Though the other circuits may not have not used the phrase "on the merits," they unanimously require an appellate decision to have reached and ruled upon the substance of a claim before collateral estoppel bars it on § 2255. *See United States v. Davis*, 406 F.3d 505, 511 (8th Cir. 2005) (section 2255 collateral estoppel bar applies to claims "raised and decided" on direct appeal); *Argencourt v. United States*, 78 F.3d 14, 16 n.1 (1st Cir. 1996) (same); *United States v. Greene*, 834 F.2d 1067, 1073 (D.C. Cir. 1987) (issues raised by defendant and decided on direct appeal were inappropriate for collateral review), *cert. denied*, 487 U.S. 1238 (1988); *United States v. Rowan*, 663 F.2d 1034, 1035 (11th Cir. 1981) (per curiam) (same); *Stephan v. United States*, 496 F.2d 527, 528-29 (6th Cir. 1974) (per curiam) (rejecting a defendant's attempt to relitigate issues in a collateral attack that had already been litigated on direct appeal), *cert. denied*, 423 U.S. 861 (1975).

The court of appeals here expelled the "merits" requirement from the doctrine of collateral estoppel. Under the new Litigation Bar, collateral estoppel bars litigation of a claim in a § 2255 petition where a petitioner's claim was dismissed on direct appeal but not adjudicated on the merits. In a published decision that is controlling in the Fourth Circuit, the court of appeals held that "Linder may not circumvent a proper ruling on his *Booker* challenge on direct appeal by re-raising the same challenge in a § 2255 motion." App. at 12a. The "proper ruling on his *Booker* challenge" refers to the Fourth Circuit's dismissal of that claim on direct appeal based on its holding that Mr. Linder's *Booker* claim fell within the scope of his direct appeal

waiver. App. at 23a-26a. No court has ever issued a "ruling" on the merits of Mr. Linder's *Booker* claim. In the opinion dissenting from the denial of rehearing *en banc*, Judge Motz identified the new rule promulgated by the court: "that a dismissal of an appeal constitutes a 'full consideration' on the merits that bars collateral review." App. at 36a. To bar Mr. Linder's *Booker* claim, the Fourth Circuit thus altered the centuries-old rule on collateral estoppel to bar litigation of his *Booker* claim even though the prior resolution of the claim did not address the merits. *Id.* ("when we dismissed Linder's direct appeal we did not 'fully consider' or 'address[ ] the merits' of his *Booker* claim; rather, we expressly *refused* to consider the merits of that claim") (emphasis in original) (Motz, J., dissenting from denial of reh'g *en banc*).

Now, in the Fourth Circuit, every defendant who waives a right to a direct appeal effectively waives all rights of review. If the defendant fails to raise a challenge to his sentencing in the direct appeal, the claim arguably would be defaulted. *See Bousley v. United States*, 523 U.S. 614, 622 (1998) ("Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either cause and actual prejudice, or that he is actually innocent.") (internal quotations omitted) (citing *Murray v. Carrier*, 477 U.S. 478, 485 (1986); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977); and *Smith v. Murray*, 477 U.S. 527, 537 (1986)). On the other hand, if the defendant raises the claim on direct appeal and has the claim dismissed without a ruling on the merits, the new Litigation Bar will prohibit litigation of the claim in a § 2255 petition.

Indeed, if on direct appeal a petitioner's claim was dismissed on grounds of ripeness, mootness, or on some direct appeal-specific bar, that claim is now arguably lost for all collateral purposes in the Fourth Circuit. Therefore, the court of appeals' new Litigation Bar works a *de facto*, involuntary waiver of collateral rights.

"[T]he opportunity for redress, which presupposes the opportunity to be heard, to argue and present evidence, must never be totally foreclosed." *Townsend v. Sain*, 372 U.S. 293, 312 (1963) (internal quotation omitted). The new Litigation Bar is fundamentally unfair, because it denies Mr. Linder, and similarly situated petitioners, the right to judicial review of the constitutionality of their sentences, even though they did not waive collateral rights. Because this decision by the court of appeals conflicts with the decisions of this Court and the overwhelming conclusion of the other courts of appeals, because direct appeal waivers are so prevalent, and because this issue substantially restricts the availability of review under § 2255, this Court should grant certiorari.

II. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER *DAY v. MCDONOUGH* APPLIES TO PETITIONS UNDER § 2255.

The Court should also grant certiorari to decide whether its holding in *Day v. McDonough*, 547 U.S. 198 (2006), should apply to § 2255 proceedings. In *Day*, the petitioner sought a writ of habeas corpus but filed his § 2254 petition after the statute of limitations had run. The State failed to raise the limitations defense in the

district court, but the court of appeals then *sua sponte* raised and applied the defense to bar the § 2254 petition. On review, this Court held that the district court possessed the discretion to raise the defense even though it had been waived by the State. However, *Day* also cautioned against exercising this discretion lightly and set forth a three-step test in the context of a § 2254 petition that must be applied before a court may exercise its discretion to consider an abandoned defense. First, "[b]efore acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions." *Id.* at 210 (internal quotations and citations omitted). Second, "the court must assure itself that the petitioner is not significantly prejudiced by the delayed focus on the limitation issue, and determine whether the interests of justice would be better served by addressing the merits or by dismissing the petition as time barred." *Id.* (internal quotations and citations omitted). Third, the court should examine whether the State's waiver resulted from negligence. *Id.* The Court further held that if the State "intelligently choose[s] to waive" a limitations defense, then a reviewing court will not be "at liberty to disregard that choice." *Id.* at 210 n.11; *see also id.* at 202 ("[W]e would count it an abuse of discretion to override a State's deliberate waiver of a limitations defense.").

Since *Day*, courts have split on whether *Day* applies to § 2255 petitions.[9] *See, e.g.*, *Wilbur v. Robinson*, 480

[9] Though *Day* involved a state prisoner, this Court cited to § 2255 cases for the proposition that "in appropriate circumstances, courts, on their own initiative, may raise a petitioner's procedural default," suggesting that its application (Cont'd)

F.3d 1140, 1148 n.12 (D.C. Cir. 2007) (*Day* "was limited to federal habeas review, focusing on the long-standing discretion of district courts regarding other threshold barriers to federal habeas review of state court decisions, where the comity interest cautions against federal assertion of jurisdiction") (internal citation and quotation omitted); *United States v. Plascencia*, 537 F.3d 385, 392 n.15 (5th Cir. 2008) (*Day* does not apply to § 2255 petitions); *United States v. Taylor*, Nos. CIV-97-1821-R, CR-93-175-R, 2008 WL 1787645, at *2 (W.D. Okla. Apr. 17, 2008) (distinguishing *Day* as applying only to § 2254 timeliness claims) (citations omitted); *cf. Humphreys v. United States*, 238 Fed. Appx. 134, 141 (6th Cir. 2007) (applying *Day* in § 2255 case); *United States v. Brown*, Cr. Action No. 99-0730, Civ. Action No. 04-4121, 2008 WL 1376307, at *3 n.8 (E.D. Pa. Apr. 8, 2008) (same).

This case presents an ideal vehicle to decide whether *Day* applies to § 2255 petitions. Here, the Respondent did not raise this defense in the district court and therefore waived it.[10] However, the court of appeals

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(Cont'd)

could extend to § 2255 federal proceedings and to issues of procedural default. *Day*, 547 U.S. at 206-7 (citing *Rosario v. United States*, 164 F.3d 729, 732 (2d Cir. 1998), and *United States v. Wiseman*, 297 F.3d 975, 979 (10th Cir. 2002)).

[10] If *Day* applies to § 2255 proceedings, a related issue is whether that decision extends to other waived defenses such as collateral estoppel. In *Day*, the question presented was "whether a federal court lacks authority, on its own initiative, to dismiss a habeas petition as untimely, once the State has answered the

(Cont'd)

overlooked the Respondent's waiver and applied its new Litigation Bar to deny relief to Mr. Linder. In doing so, the court of appeals did not apply an analysis even analogous to that set forth in *Day*. Should this Court hold that *Day* applies to a waived defense of collateral estoppel in the § 2255 context, the decision of the court of appeals to ignore the Respondent's waiver would be a clear abuse of its discretion for several reasons.

First, the court of appeals did not, as a prerequisite to deciding to consider the waived defense, address the interests identified in *Day*, to Mr. Linder's substantial detriment. Instead of "assur[ing] itself that the petitioner is not significantly prejudiced by the delayed focus on the [waived defense], and determin[ing] whether the interests of justice would be better served by addressing the merits or by dismissing the petition," the court of appeals ignored prejudice to Mr. Linder.

(Cont'd)

petition without contesting its timeliness." *Day*, 547 U.S. at 202. *Day* discussed *sua sponte* consideration of waived failure to exhaust defenses, *see Granberry v. Greer*, 489 U.S. 421 (1997), and waived nonretroactivity defenses, *see Caspari v. Bohlen*, 510 U.S. 383 (1994), in the context of § 2254 proceedings. *See Day*, 547 U.S. at 210-11 ("the court must assure itself that the petitioner is not significantly prejudiced by the delayed focus *on the limitation issue*, and determine whether the interests of justice would be better served by addressing the merits or by dismissing the petition *as time barred*") (emphasis added and internal quotations omitted). Yet the Court also wrote that "it would make scant sense to distinguish in this regard [the Antiterrorism and Effective Death Penalty Act of 1996]'s time bar from other threshold constraints on federal habeas petitioners," *id.* at 209, suggesting that *Day*'s applicability may not be limited to the statute of limitations defense.

See Day, 547 U.S. at 210. As Judge Motz noted in dissent from the denial of rehearing, "the most critical 'unique circumstance' in this case is the conceded fact that Linder's sentence violates the Constitution. Rather than justifying a denial of habeas relief, this 'circumstance' provides a powerful reason for granting such relief and refusing to ignore the Government's default." App. at 36a (Motz, J., dissenting from the denial of reh'g *en banc*). The panel's analysis, by contrast, focused on an *ad hoc* collection of facts:

> Even if we agreed with Linder that the Government had failed to raise the waiver argument in the district court, we would still consider it in the unique circumstances of this case where (1) Linder appealed his sentence despite the appeal waiver in his plea agreement, (2) the Government sought to enforce the waiver of appellate rights on direct appeal, (3) we granted the motion to dismiss the direct appeal on the basis of the knowing and voluntary waiver, (4) there is no suggestion that our ruling on direct appeal was in error, and (5) Linder now presents the same challenges to his sentence on collateral review. Were we not to consider the Government's waiver argument, we would effectively be reversing our prior decision on direct appeal even though its correctness has not been challenged.

App. at 12a n.2 (internal citations omitted). This *ad hoc* rationale would be deficient if *Day* applies to § 2255 petitions because it fails to consider prejudice to

Mr. Linder, and it fails to analyze the interests of justice, other than to incorrectly assert that the court would have to reverse itself if it granted relief. As Judge Motz wrote in dissent "[t]welve years of a man's life ought to trump any imagined tension between dismissal of Linder's direct appeal and a grant of habeas relief to him. Indeed, permitting this unconstitutional sentence to stand may well constitute the sort of miscarriage of justice that we could and should correct *even if* the Government had not defaulted its waiver argument." App. at 41a (Motz, J., dissenting from the denial of reh'g *en banc*) (internal quotation omitted).

Second, the court of appeals made no inquiry into the deliberateness of the Respondent's waiver of a collateral estoppel defense, even though the Respondent offered no excuse for omitting this affirmative defense. Nor can the Respondent point to an intervening change that might explain the waiver.[11] App. 12a n.2. The court of appeals should have at least considered whether the Respondent deliberately chose not to advance a

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[11] *Day* involved a district court's *sua sponte* consideration of a waived statute of limitations claim. Here, the Government raised the issue for the first time on appeal. In a case akin to the instant one, where the government waived a procedural default defense at the district court and the lower court entered a decision on the merits, the Tenth Circuit suggested that its consideration of the defense would be "*sua sponte*" even though the government raised the issue in its appellate brief. *See United States v. Allen*, 16 F.3d 377, 379 (10th Cir. 1994) ("when the government has not raised procedural bar" at the district court but raised it for the first time on appeal, "and it appears to the court that raising it *sua sponte* will not further the interests expressed above, we can simply address the merits of the § 2255 motion").

collateral estoppel defense, and under *Day*, if the Government "intelligently choose[s] to waive" a limitations defense, then the court of appeals would not be "at liberty to disregard that choice." *Day*, 547 U.S. at 210 n.11.

Third, the court of appeals did not provide Mr. Linder with adequate notice or a full and fair opportunity to oppose the new Litigation Bar. The Litigation Bar was not identified in the certificate of appealability; nor was it mentioned by the court of appeals at oral argument. Even if the Respondent's appellate brief, which raised this issue for the first time, can be considered adequate notice and an opportunity to oppose, Mr. Linder was never apprised that the court of appeals was considering applying a new variation on collateral estoppel that omitted the requirement that the claim was previously decided on the merits.[12]

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[12] *Day* ruled that a district court had the power to *sua sponte* consider a waived defense, but the courts are split as to whether *Day* gives that power to appellate courts after the district court has already ruled on the merits. Some courts hold that *Day* is limited to the district court's power to *sua sponte* consider a waived defense, and is inoperative after the district court has reached the merits of the case. *See, e.g., Barnett v. Roper*, 541 F.3d 804, 807-8 (8th Cir. 2008) (holding that government's waiver of timeliness defense could not be considered *sua sponte* on appeal where district court had reached the merits); *Showers v. Beard*, No. 3:CV-03-2264, 2009 WL 917770, at *2 (M.D. Pa. April 2, 2009) (denying application of *Day* to waived timeliness defense on motion for reconsideration where the district court had ruled on the merits). But some circuit courts have considered, *sua sponte*, a defense waived by the government at the district court after the petition

(Cont'd)

As stated plainly by Judge Motz, the court of appeals' decision "utterly failed to vindicate our Constitution's promise of equal justice under law." App. at 28a (Motz, J., dissenting from the denial of reh'g *en banc*). Whether *Day* applies to § 2255 petitions is a critically important issue, and it is squarely presented by this case. This Court should grant certiorari to review this issue.

III. THIS CASE PRESENTS AN IDEAL VEHICLE FOR REVIEW OF THESE ISSUES.

This case presents a perfect vehicle through which to clarify these issues. This Court has jurisdiction to review the decision of the court of appeals, and Mr. Linder's petition was timely, as were each of his prior prayers for relief. These issues are ripe for decision, and Mr. Linder raised his *Booker* claim at every judicial stage of the proceedings after his guilty plea. Mr. Linder's appeal also is not moot: Mr. Linder's sentence plainly violates *Booker*, he preserved this issue at every level, and a ruling on the merits would result in a 12-year reduction in his sentence.

While Mr. Linder diligently pursued his *Booker* claim, the decisions by the courts below have been riddled with clear errors – each of which has prevented

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(Cont'd)
was decided on the merits below. *See, e.g., Rosario*, 164 F.3d at 732-33 (holding that "this appeal warrants the exercise of our inherent power to raise the previously unaddressed issue" where the district court had ruled on the merits of the § 2255 petition); *Allen*, 16 F.3d at 379 n.2 ("we have the same power [to consider waived defenses *sua sponte*] on appeal").

Mr. Linder from even once receiving a ruling on the merits of his claim. To briefly recap:

- Though it was following controlling law at the time, the district court erred when, over Mr. Linder's specific objection, it sentenced Mr. Linder to a term longer than the maximum he would have received based on the facts admitted in his plea agreement and based on the belief that the Guidelines were mandatory.

- On direct appeal, the Fourth Circuit incorrectly held that Mr. Linder's *Booker* challenge fell within the scope of his plea agreement. *See supra* note 3.

- The district court subsequently incorrectly denied Mr. Linder's § 2255 petition on the ground that his conviction had become final before *Booker* was decided, contrary to the clear rule in *Clay* that his conviction became final only when this Court denied certiorari, which was after *Booker* was decided. *See supra* note 4. The Fourth Circuit on appeal corrected this clear error and reversed the district court's finality ruling. App. at 10a.

- The court of appeals then denied § 2255 relief by (1) promulgating a novel, new variation on the collateral estoppel bar, even though (2) the Respondent had waived this defense, with (3) inadequate notice and opportunity to respond.

In addition, the court of appeals applied the new Litigation Bar retroactively to Mr. Linder's § 2255 petition to bar his *Booker* claim. While this Court has noted that new rules promulgated under a court's "supervisory power" ordinarily apply retroactively to the case at bar, those cases have not ordinarily involved retroactive application of rules that barred collateral or habeas relief. *See Castro v. United States*, 540 U.S. 375, 383 (2003) (applying supervisory power to create a rule requiring lower courts to provide a litigant notice and an opportunity to withdraw or amend a filing that the court intends to treat as a § 2255 motion); *McNabb v. United States*, 318 U.S. 332, 341 (1943) (applying supervisory power to exclude petitioner's confession as evidence against him). Furthermore, where a new rule bars a petitioner's ability to seek relief, this Court has endorsed prospective application of the new rule. *See Thomas v. Arn*, 474 U.S. 140, 145 (1980) (upholding a rule that a failure to file objections to a magistrate's report waives the right to appeal a district court judgment based on the report, but only after the rule had been announced in a prior case and prospectively applied). In *Arn*, for example, this Court upheld a rule promulgated by the United States Court of Appeals for the Sixth Circuit in *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). When the Sixth Circuit announced the new rule in *Walters*, it held that the new rule – which would serve as a bar to habeas petitioners – applied only prospectively:

> [W]e give our ruling only prospective effect because rules of procedure should promote, not defeat the ends of justice, *Hormel v. Helvering*, 312 U.S. 552, 557, 61 S.Ct. 719, 721,

> 85 L.Ed. 1037 (1941), the position of the United States was plausible, and our rule was not invariably anticipated.

Id. at 950. This analysis, which is principled and protective of habeas and collateral review rights, sets in stark relief the analysis of the court of appeals in this case, which applied the new Litigation Bar retroactively to bar Mr. Linder's petition with no analysis whatsoever. This case presents an ideal vehicle to decide whether and when a new procedural rule promulgated in an exercise of a court's supervisory power may be applied retroactively to the case at bar.

Finally, this case implicates this Court's supervisory powers and presents an ideal vehicle to clarify the issues set forth above. *See Corley v. United States*, 129 S.Ct. 1558, 1562 (2009) (describing reason for invocation of supervisory power as "to establish and maintain civilized standards of procedure and evidence in federal courts") (internal quotation omitted).

CONCLUSION

This Court should grant the petition for a writ of certiorari.[13]

Respectfully submitted,

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[13] Alternatively, summary reversal is warranted.

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED JANUARY 12, 2009

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 07-6137

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JASON LANDIS LINDER, a/k/a BLACK, a/k/a RODNEY PETERSON,

Defendant-Appellant.

Argued: December 3, 2008

Decided: January 12, 2009

OPINION

WILLIAMS, Chief Judge:

In a written plea agreement with the Government, Jason Landis Linder knowingly and voluntarily waived his right to a direct appeal of his conviction and sentence for conspiracy to distribute and possess with the intent to distribute heroin. On direct appeal, we enforced this

waiver and rejected Linder's challenge to his sentence under *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). Now, in this 28 U.S.C.A. § 2255 (West 2006 & Supp. 2008) proceeding, Linder once again seeks to escape the terms of his plea agreement, asking us to remand his case for resentencing. We decline to do so. Linder simply may not avoid the consequences of his knowing and voluntary appeal waiver and our prior judgment by re-raising his *Booker* claim on collateral review.

I.

On May 25, 2004, Linder knowingly and voluntarily pleaded guilty pursuant to a written plea agreement to one count of conspiracy to distribute and possess with the intent to distribute one kilogram or more of heroin in violation of 21 U.S.C.A. §§ 846, 841(a)(1) and (b)(1)(A) (West 1999 & Supp. 2008). The plea agreement provided in relevant part:

> **4. Waiver of Appeal and Review**
>
> The defendant also understands that Title 18, United States Code, Section 3742 affords a defendant the right to appeal the sentence imposed. Nonetheless, *the defendant knowingly waives the right to appeal the conviction and any sentence within the maximum provided in the statute of conviction (or the manner in which that sentence was determined) on the grounds set*

> *forth in Title 18, United States Code, Section 3742 or on any ground whatsoever*, in exchange for the concessions made by the United States in this plea agreement.[1]

(J.A. at 53 (emphasis added).) At Linder's plea hearing, the district court conducted a proper Rule 11 colloquy, during which Linder stated that he had signed the plea agreement, initialed the bottom of each page, read each paragraph, discussed the agreement with counsel, and fully understood the agreement. Linder also specifically acknowledged that he understood that he was waiving his right to appeal any sentence within the statutory maximum. The district court accepted Linder's plea, finding "that [Linder] is fully competent and capable of entering an informed plea, that he understands the nature of the charges and the consequences of his plea, [and] that the plea of guilty is a knowing and voluntary plea supported by an independent basis in fact

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1. "Applying standard contract law, we enforce a plea agreement's plain language in its ordinary sense and do not write the contracts of the parties retroactively, but merely construe the terms of the contract the parties have previously signed." *United States v. Jordan*, 509 F.3d 191, 195 (4th Cir. 2007) (internal quotation marks and citations omitted). In the plea agreement, Linder waived only his "right to appeal," not his right to seek collateral review under § 2255. Of course, a collateral attack is distinct from a direct appeal. Thus, under the plain language of the plea agreement, Linder did not waive his right to file a § 2255 motion. *See United States v. Pruitt*, 32 F.3d 431, 433 (9th Cir. 1994) ("A plea agreement does not waive the right to bring a § 2255 motion unless it does so expressly. The government gets what it bargains for but nothing more.").

containing each of the essential elements of the offense." (J.A. at 50.)

Following Linder's guilty plea but prior to his sentencing, the Supreme Court decided *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), holding that the Sixth Amendment right to a jury trial applies, in state criminal proceedings, to any fact that increases the penalty for a crime beyond the prescribed statutory maximum. *Id.* at 303-05, 124 S.Ct. 2531. We subsequently issued a published order in *United States v. Hammoud*, 378 F.3d 426 (4th Cir. 2004), *vacated*, 543 U.S. 1097, 125 S.Ct. 1051, 160 L.Ed.2d 997 (2005), instructing district courts to "continue sentencing defendants in accordance with the guidelines, as was the practice before *Blakely*," and recommending that, "[i]n the interest of judicial economy," district courts "also announce, at the time of sentencing, a sentence pursuant to 18 U.S.C. § 3553(a) [ ], treating the guidelines as advisory only." *Id.*

Thereafter, a probation officer prepared a Presentence Investigation Report ("PSR") for Linder. In the PSR, the probation officer attributed 4,888.736 grams of heroin and 9.6 grams of cocaine base to Linder through relevant conduct, *see* U.S. Sentencing Guidelines Manual ("U.S.S.G.") § 1B1.3 (2003), and, based on these amounts, determined that Linder's base offense level was 34 pursuant to U.S.S.G. § 2D1.1(c)(3) (2003). The probation officer determined that Linder was subject to both a four-level enhancement pursuant to U.S.S.G. § 3B1.1(a) (2003) for his leadership role in

the offense and a three-level reduction pursuant to U.S.S.G. § 3E1.1 (2003) for his acceptance of responsibility.

Linder objected to the probation officer's determination of drug weights in the PSR as well as the description of his role in the conspiracy. Linder also asserted that the holding in *Blakely* should apply to his sentencing proceedings, arguing that the Sixth Amendment right to a jury trial attaches to findings that enhance a defendant's sentence under the Federal Sentencing Guidelines. Thus, Linder contended that, based on a drug weight of 1,500 grams of heroin—the amount the Government thought it could prove at the time the plea was entered, his base offense level should be 32 (rather than 34). On October 1, 2004, the district court denied Linder's motion to strike and dismiss the sentencing guidelines enhancements from the PSR, citing *Hammoud* for the proposition that "*Blakely* does not apply to the United States Sentencing Guidelines." (J.A. at 93.)

At sentencing on October 4, the district court found by a preponderance of the evidence that the drug weights involved exceeded four kilograms of heroin and set the base offense level at 34. The district court increased the offense level by 4, finding by a preponderance of the evidence that Linder acted in a leadership or organizer role in a conspiracy that involved five or more participants, and reduced the offense level by 3 for Linder's acceptance of responsibility, so that Linder's total offense level was 35. Based on this offense

level and Linder's Criminal History Category of V, the district court sentenced him under the then-mandatory guidelines to 262 months imprisonment. Following our guidance in *Hammoud*, the district court also found that "[i]n the event the Court was not confined by the sentencing guidelines in this case, the Court would impose a sentence of 120 months." (J.A. at 159.)

Noting that the sentence imposed was within the statutory maximum and that Linder had previously waived his right to appeal any sentence within the statutory maximum, the district court asked Linder if he still wanted to abide by his waiver of his right to appeal. Linder responded, "Yes, sir." (J.A. at 157.) The district court entered the judgment on October 13, 2004.

Despite the waiver of his right to appeal, Linder noticed a timely appeal on October 14, 2004, challenging his sentences based on *Blakely*. While his direct appeal was still pending before us, the Supreme Court decided *Booker* on January 12, 2005, holding that "the Sixth Amendment as construed in *Blakely* does apply to the Sentencing Guidelines," *Booker*, 543 U.S. at 226-27, 125 S.Ct. 738, and that "two provisions of the Sentencing Reform Act of 1984 (SRA) that have the effect of making the Guidelines mandatory must be invalidated," *id.* at 227, 125 S.Ct. 738. The Supreme Court applied the holdings "to all cases on direct review." *Id.* at 268, 125 S.Ct. 738.

Ultimately, the Government invoked the appeal waiver in Linder's plea agreement, and we dismissed

Linder's appeal on April 5, 2006, concluding that Linder waived his right to appeal and that the waiver included any challenges under *Blakely* or *Booker*. *United States v. Linder*, 174 Fed.Appx. 174, 175 (4th Cir. 2006) (per curiam) (unpublished). The Supreme Court denied certiorari on October 2, 2006. *Linder v. United States*, 549 U.S. 938, 127 S.Ct. 328, 166 L.Ed.2d 245 (2006).

In addition to his petition for a writ of certiorari before the Supreme Court, on July 13, 2006, Linder, acting *pro se*, filed a Memorandum in Aid of Sentencing ("Petition for Relief") in the district court, requesting that the district court, in light of *Booker*, "vacate the sentence of 262 months and impose the Court['s] alternate sentence of 120 months." (J.A. at 185.) The district court informed Linder that it "intend[ed] to construe [Linder]'s motion under 28 U.S.C. § 2255 (Supp. IV 1998), as a Motion to Vacate, Set Aside and/or Correct Sentence," and ordered Linder to file a response within 30 days to the court's intention to construe the motion in this manner. (J.A. at 191.)

On August 18, 2006, Linder, through counsel, filed a Motion to Impose Alternative Sentence, which the district court incorporated into Linder's Petition for Relief under § 2255. On October 12, 2006, the district court denied the Petition for Relief, reasoning as follows:

> [T]he Fourth Circuit has squarely held that the rule in *Booker* is not to be applied retroactively to prisoners whose convictions became final before *Booker* was decided.

Appendix A

> Petitioner's judgment was filed on October 13, 2004. *Booker* was decided on January 12, 2005. Petitioner's appeal to the Fourth Circuit was dismissed and his motion to remand denied because Petitioner waived his right to appeal in the plea agreement. Therefore, Petitioner's conviction was final before *Booker*, and *Booker* does not apply in the instant case.

(J.A. at 209-10 (internal citations omitted).)

Linder, *pro se*, filed a Motion to Alter or Amend Judgment, arguing that his conviction was not final on the date the Supreme Court decided *Booker* and that, under *Clay v. United States*, 537 U.S. 522, 123 S.Ct. 1072, 155 L.Ed.2d 88 (2003), his conviction did not become final until the Supreme Court denied certiorari on October 2, 2006. The district court denied the motion, and this appeal followed.

We possess jurisdiction under 28 U.S.C.A. §§ 1291 and 2253 (West 2006).

II.

A.

In an appeal from the denial of a § 2255 motion, we review a district court's legal conclusions *de novo*. *United States v. Poindexter*, 492 F.3d 263, 267 (4th Cir. 2007).

Appendix A

The Supreme Court has held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases . . . pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987). Applying this principle, the *Booker* Court held that its holdings applied "to all cases on direct review," but was careful to note that not "every appeal will lead to a new sentencing hearing" because it "expect[ed] reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain-error' test." 543 U.S. at 268, 125 S.Ct. 738. Pursuant to this guidance, we upheld Linder's appeal waiver and denied him *Booker* relief on direct appeal even though he was sentenced under the mandatory Guidelines.

Now, on appeal of the district court's denial of his § 2255 motion seeking a remand for resentencing consistent with *Booker*, Linder argues that, despite his appeal waiver, his case was "pending on direct review" when *Booker* was decided on January 12, 2005 because he timely noticed a direct appeal on October 14, 2004 and we did not resolve his direct appeal until April 5, 2006—nearly 15 months after *Booker* was decided. In Linder's view, his conviction was not "final" until the Supreme Court denied certiorari on October 2, 2006. Thus, Linder maintains that *Booker*'s holdings apply to his case and that we must remand for resentencing consistent with *Booker*.

The Government counters that *Booker* is unavailable to Linder in his § 2255 motion because Linder litigated and lost his Sixth Amendment claim on direct appeal. The Government therefore contends that Linder may not avoid the consequences of his appeal waiver and our prior judgment by reviving his *Booker* claim in a § 2255 motion.

B.

We agree with Linder that his conviction was not "final" until the Supreme Court denied certiorari. *See Clay*, 537 U.S. at 527, 123 S.Ct. 1072 (noting that, in the context of post-conviction relief, "[f]inality attaches when [the Supreme] Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires"); *Latham v. United States*, 527 F.3d 651, 653 (7th Cir.2008) ("A defendant who forswears appellate review as part of a plea bargain remains entitled to file a notice of appeal. Although that appeal is doomed unless the guilty plea is involuntary . . . the possibility that the defendant will be able to have the plea vitiated permits at least the preliminary stages of an appeal. . . . If we dismiss the appeal, the defendant is entitled to ask the Supreme Court to review our judgment by writ of certiorari, and *Clay* will determine the date on which the conviction becomes 'final'."). Thus, Linder's conviction was not "final" at the time *Booker* was decided. We still must decide, however, whether Linder is entitled to relief under *Booker* on collateral review given that we already denied him such relief on direct appeal.

In *Shea v. Louisiana*, 470 U.S. 51, 105 S.Ct. 1065, 84 L.Ed.2d 38 (1985), the Supreme Court confronted the issue of whether *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), was "applicable to a case pending on direct appeal in a state court at the time *Edwards* was decided." *Shea*, 470 U.S. at 52, 105 S.Ct. 1065. In resolving the issue, the Court held:

> [I]f a case was pending on direct review at the time *Edwards* was decided, the appellate court must give retroactive effect to *Edwards*, *subject, of course, to established principles of waiver*, harmless error, and the like. If it does not, then a court conducting collateral review of such a conviction should rectify the error and apply *Edwards* retroactively. This is consistent with Justice Harlan's view that cases on collateral review ordinarily should be considered in light of the law as it stood when the conviction became final.

Id. at 58 n. 4, 105 S.Ct. 1065 (emphasis added).

We find this holding determinative of the issue before us. On direct appeal, Linder challenged his sentence based on *Blakely* and *Booker*. *See Linder*, 174 F. App'x at 175. Consistent with *Shea*'s instruction that "the appellate court must give retroactive effect to [a new rule for the conduct of criminal prosecutions], subject . . . to . . . waiver," we refused to give effect to *Blakely* or *Booker* because Linder's challenges were within the scope of his plea agreement's knowing and

voluntary direct appeal waiver. *See Linder*, 174 F. App'x at 175 (dismissing claims challenging sentences based on *Blakely* and *Booker* "[b]ecause the Appellants waived their appellate rights in their plea agreements"). Linder may not circumvent a proper ruling on his *Booker* challenge on direct appeal by re-raising the same challenge in a § 2255 motion.[2] *See* Brian R. Means, *Fed. Habeas Practitioner Guide*, Jurisdiction ¶ 1.23.0

2. Linder argues that the Government waived this argument because it did not raise the direct appeal waiver as a procedural bar to relief under Linder's § 2255 motion before the district court. Even if we agreed with Linder that the Government had failed to raise the waiver argument in the district court, we would still consider it in the unique circumstances of this case where (1) Linder appealed his sentence despite the appeal waiver in his plea agreement, (2) the Government sought to enforce the waiver of appellate rights on direct appeal, (3) we granted the motion to dismiss the direct appeal on the basis of the knowing and voluntary waiver, (4) there is no suggestion that our ruling on direct appeal was in error, and (5) Linder now presents the same challenges to his sentence on collateral review. *See United States v. Metzger*, 3 F.3d 756, 758 (4th Cir. 1993) (suggesting that, even where Government failed to raise waiver as a procedural bar, "unique interests in judicial efficiency, conservation of scarce judicial resources, and orderly and prompt administration of justice" may sometimes support our consideration of the waiver as a procedural bar (internal quotation marks omitted)); *cf. Rosario v. United States*, 164 F.3d 729, 732-33 (2d Cir. 1998) (holding that, under "the unique circumstances of this case," consideration of the issue of defendants' procedural default was "appropriate" even though the Government had failed to raise the argument). Were we not to consider the Government's waiver argument, we would effectively be reversing our prior decision on direct appeal even though its correctness has not been challenged.

(2006/2007) ("Where the petitioner only waives the right to appeal, he is not precluded from filing a petition for collateral review. But he is precluded from raising claims that are the sort that *could have* been raised on appeal." (emphasis in original) (internal citations omitted)); *cf. Boeckenhaupt v. United States*, 537 F.2d 1182, 1183 (4th Cir. 1976) (per curiam) ("Boeckenhaupt will not be allowed to recast, under the guise of collateral attack, questions fully considered by this court in [his direct appeal]."); *United States v. Sanin*, 252 F.3d 79, 83 (2d Cir. 2001) ("It is well established that a § 2255 petition cannot be used to relitigate questions which were raised and considered on direct appeal." (internal quotation marks omitted)); *DuPont v. United States*, 76 F.3d 108, 110 (6th Cir. 1996) (same). We therefore conclude that relief under *Booker* is unavailable to Linder on collateral review.

III.

For the foregoing reasons, the judgment of the district court is hereby

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION DATED DECEMBER 14, 2006 AND FILED DECEMBER 15, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

CRIMINAL ACTION NO. 2:04cr16

JASON LANDIS LINDER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ORDER

This matter is before the Court on Petitioner Jason Landis Linder's Motion to Alter or Amend Judgment. For the reasons stated below, Petitioner's Motion is **DENIED**.

1. FACTUAL AND PROCEDURAL HISTORY

Petitioner pled guilty on May 25, 2004 and waived his right to appeal. On October 13, 2004, the Court entered a Judgment of Conviction against Petitioner

sentencing him to 262 months imprisonment. Notwithstanding his waiver of appeal, Petitioner filed a notice of appeal on October 14, 2004. The Fourth Circuit dismissed Petitioner's appeal on April 5, 2006 and denied Petitioner's petition for rehearing on May 15, 2006. Petitioner filed a motion to impose an alternate sentence on July 13, 2006, which the Court construed as a 28 U.S.C. § 2255 petition. On October 12, 2006, the Court denied Petitioner's § 2255 petition.

On October 30, 2006, Petitioner filed a motion to alter or amend a judgment under Federal Rule of Civil Procedure 59(e). Petitioner argues that the Court erred in considering and deciding Petitioner's prior motion to impose the alternate sentence because Petitioner's petition for certiorari before the Supreme Court was still pending. Petitioner reports that the Supreme Court denied certiorari on October 2, 2006, so that his conviction was not final until that date. Petitioner argues that therefore, the retroactivity of *United States v. Booker*, 543 U.S. 220 (2005) is not at issue and the alternate sentence announced by the Court can be imposed.

II. LEGAL STANDARD

The United States Court of Appeals for the Fourth Circuit (the "Fourth Circuit") recognizes three grounds for amending an earlier judgment: (1) an intervening change in controlling law, (2) the emergence of evidence not previously available, and (3) the correction of a clear error of law or the prevention of manifest injustice.

Hutchinson v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993). Mere disagreement with a court's application of the law does not support a Rule 59(e) motion. *Id.* at 1082; *Int'l Longshoremen's Assoc. v. Virginia Int'l Terminals*, 932 F. Supp. 761, 762 (E.D. Va. 1996).

III. DISCUSSION

Petitioner's motion states that the Supreme Court denied certiorari in his case on October 2, 2006, This Court did not rule on Petitioner's § 2255 motion until October 12, 2006. Therefore, this Court had jurisdiction to consider Petitioner's motion when its ruling was issued.

In addition, "[A] defendant in a criminal case cannot complain of error which he himself has invited." *Shields v. United States*, 273 U.S. 583, 586 (1927) (quotation omitted); *United States v. Herrera*, 23 F.3d 74, 75 (4th Cir. 1994). Petitioner prematurely filed his § 2255 while his petition for certiorari was still pending. Also, Petitioner failed to raise any jurisdictional arguments when given the opportunity to do so when, pursuant to *United States v. Emmanuel*, 288 F.3d 644 (4th Cir. 2002), this Court notified Petitioner of its intention to construe his initial motion as a § 2255 petition. Consequently, any error occasioned by premature consideration of Petitioner's § 2255 motion was invited by Petitioner.

Appendix B

III. CONCLUSION

For the foregoing reasons, Petitioner's Motion to Alter or Amend Judgment is **DENIED**.

The Court **ADVISES** Petitioner that he may appeal from this final Order by forwarding a written notice of appeal to the Clerk of the United States District Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510. The Clerk must receive this written notice within sixty (60) days from this Order's date.

The Clerk is **DIRECTED** to send a copy of this Order to Petitioner and to the United States Attorney, Eastern District of Virginia, World Trade Center, Suite 8000, 101 West Main Street, Norfolk, VA 23510.

IT IS SO ORDERED.

s/ Raymond A. Jackson
Raymond A. Jackson
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
December 14, 2006

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION DATED OCTOBER 11, 2006 AND FILED OCTOBER 12, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

CRIMINAL ACTION NO. 2:04cr16

JASON LANDIS LINDER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ORDER

This matter is before the Court on Petitioner Jason Landis Linder's Motion under 28 U.S.C. § 2255 (2000) to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody. For the following reasons, Petitioner's motion is **DENIED**.

I. FACTS AND PROCEDURAL HISTORY

Jason Landis Linder ("Petitioner") was charged in a criminal indictment on February 9, 2004 with conspiracy to distribute and possess with intent to

distribute one kilogram or more of heroin, in violation of 21 U.S.C. § 846 (2000). On May 25, 2004, Petitioner pled guilty to Count One of the one-count indictment. A sentencing hearing was held on October 4, 2004. At the hearing Petitioner challenged the drug weights set forth in the presentence report. The Court found by a preponderance of the evidence that the drug weights in the presentence report were accurate. The Court also found that Petitioner was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, and so credited Petitioner with a four-point enhancement under U.S.S.G. § 3B1.1(a). The Court, pursuant to the sentencing guidelines, sentenced Petitioner to a term of 262 months imprisonment. Also, pursuant to the United States Court of Appeals for the Fourth Circuit ("the Fourth Circuit")'s directive from *United States v. Hammoud*, 378 F.3d 426, 426 (4th Cir. 2004), the Court announced an alternative sentence that it would have imposed under 18 U.S.C. § 3553(a) (2000) if the sentencing guidelines were advisory only. The alternative sentence the Court announced included 120 months incarceration.

Petitioner filed a notice of appeal on October 14, 2004. Petitioner sought to raise claims against his sentence based on *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 543 U.S. 220 (2005). On April 5, 2006, the Fourth Circuit dismissed Petitioner's appeal in an unpublished opinion and denied his motion to remand. On May 15, 2006, the Fourth Circuit denied Petitioner's petition for rehearing and rehearing en banc.

Appendix C

On July 13, 2006, Petitioner tiled a motion to impose the alternate sentence. The Court issued an order on July 18, 2006 informing Petitioner of its intention to construe Petitioner's motion as a Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255. On August 18, 2006, Petitioner filed a renewed motion to impose the alternate sentence under § 2255 as well as a memorandum in support of the motion. On September 26, 2006, Respondent filed a response to Petitioner's motion.

II. STANDARD OF REVIEW AND BURDEN OF PROOF

A federal prisoner seeking to vacate his sentence may seek relief under 28 U.S.C. § 2255 "on the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." A petitioner collaterally attacking his sentence or conviction pursuant to § 2255 bears the burden of proving his grounds for collateral attack by a preponderance of the evidence. *Vanater v. Boles*, 377 F.2d 898, 900 (4th Cir. 1967), *Miller v. United States*, 261 F.2d 546 (4th Cir. 1958) (per curiam). If the motion is brought before the judge that presided over the conviction, the judge may rely upon recollections of previous events. *Blackledge v. Allison*, 431 U.S. 63, 74 n.4 (1977); *Carvell v. United States*, 173 F.2d 348, 348-49 (4th Cir. 1949) (stating it is highly desirable that

§ 2255 motions "be passed on by the judge who is familiar with the facts and circumstances surrounding the trial, and is consequently not likely to be misled by false allegations as to what occurred.").

It should also be noted that the burden on a petitioner collaterally attacking his sentence under § 2255 is heavier than his burden on appeal. *United States v. Frady*, 456 U.S.152, 166 (1982). Despite this heavier burden, a *pro se* petitioner is entitled to have his petition and asserted issues construed liberally. *Pro se* petitioners are held to a less stringent standard than attorneys drafting such complaints. *Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1978). Accordingly, the Court has interpreted the allegations and facts as reasonably as possible.

III. DISCUSSION

Petitioner argues that the Court should impose the alternate sentence announced at his sentencing in light of the Supreme Court's decision in *Booker*. However, the Fourth Circuit has squarely held that the rule in *Booker* is not to be applied retroactively to prisoners whose convictions became final before *Booker* was decided. *United States v. Morris*, 429 F.3d 65, 72 (4th Cir. 2005). Petitioner's judgment was filed on October 13, 2004. *Booker* was decided on January 12, 2005. Petitioner's appeal to the Fourth Circuit was dismissed and his motion to remand denied because Petitioner waived his right to appeal in the plea agreement. Therefore, Petitioner's conviction was final before *Booker*, and

Booker does not apply in the instant case. As this was the only ground advanced by Petitioner in support of his motion, Petitioner's motion is without merit.

IV. CONCLUSION

For the foregoing reasons, Petitioner's Motion to Vacate, Set Aside or Correct his Sentence under 28 U.S.C. § 2255 is **DENIED**.

The Court **ADVISES** Petitioner that he may appeal from this final Order by forwarding a written notice of appeal to the Clerk of the United States District Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510. The Clerk must receive this written notice within sixty (60) days from this Order's date.

The Clerk is **DIRECTED** to send a copy of this Order to Petitioner and to the United States Attorney, Eastern District of Virginia, World Trade Center, Suite 8000, 101 West Main Street, Norfolk, VA 23510.

IT IS SO ORDERED.

s/ Raymond A. Jackson
Raymond A. Jackson
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
October 11, 2006

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED APRIL 5, 2006

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Nos. 04-4905, 04-4916

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JASON LANDIS LINDER, a/k/a BLACK, a/k/a RODNEY PETERSON,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JEFFREY TARRANTS, a/k/a SKIP, a/k/a OZZY,

Defendant-Appellant.

Submitted: March 8, 2006
Decided: April 5, 2006

Before WILKINSON and TRAXLER, *Circuit Judges*, and HAMILTON, *Senior Circuit Judge*.

Appendix D

In these consolidated appeals, Jason Landis Linder and Jeffrey Tarrats seek to appeal their convictions and sentences to 262 months in prison and five years of supervised release after pleading guilty to conspiring to distribute and possess with intent to distribute one kilogram or more of heroin in violation of 21 U.S.C. § 846 (2000). They seek to raise claims challenging their sentences based on *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). Because the Appellants waived their appellate rights in their plea agreements, we grant the Government's motions to dismiss on that basis and deny Appellants' motions to remand.

When the Government seeks to enforce a waiver of appellate rights, and there is no claim that the Government breached the plea agreement, this court will enforce the waiver if the record establishes the defendant knowingly and intelligently agreed to waive the right to appeal, and the issue being appealed is within the scope of the waiver. *United States v. Blick*, 408 F.3d 162, 168-69 (4th Cir.2005). "An appeal waiver is not knowingly or voluntarily made if the district court fails to specifically question the defendant concerning the waiver provision of the plea agreement during the Rule 11 colloquy and the record indicates that the defendant did not otherwise understand the full significance of the waiver." *United States v. Johnson*, 410 F.3d 137, 151 (4th Cir.), *cert. denied*, 546 U.S. 952, 126 S.Ct. 461, 163 L.Ed.2d 350 (2005) (internal quotations and citations omitted).

Appendix D

In their plea agreements, Appellants each waived their rights to appeal their convictions and "any sentence within the maximum provided in the statute of conviction (or the manner in which that sentence was determined) on . . . any ground whatsoever." Appellants do not contend the district court failed to question them concerning their appellate waivers at their guilty plea hearings or that they did not otherwise understand the full significance of their waivers. Further, they do not assert that their sentences exceeded the statutory maximum or that the Government breached their plea agreements.

Linder contends that while he "did waive his right to appeal in the plea agreement," the "agreement did not contemplate *Blakely*." However, his argument is foreclosed by our decisions in *Johnson*, 410 F.3d at 153, and *Blick*, 408 F.3d at 170. Tarrats contends the Government's failure to object, after the district court inquired at the end of his sentencing hearing whether "he still wish[ed] to follow" his appellate waiver and Tarrats's counsel stated that *Blakely* "would be the sole reason for an appeal," constituted either a modification of his appellate waiver or a waiver by the Government of its right to enforce the appellate waiver on appeal. We disagree. We find there was no mutually agreed upon modification of the waiver of appellate rights contained in Tarrats's knowing and voluntary plea agreement. Moreover, the Government has timely and diligently pursued enforcement of the appellate waiver on appeal.

Accordingly, we grant the Government's motions to dismiss and deny the Appellants' motions to remand. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

APPENDIX E — ORDER DENYING PETITION FOR REHEARING AND OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT FILED MARCH 24, 2009

Filed: March 24, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-6137

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JASON LANDIS LINDER, a/k/a BLACK,
a/k/a RODNEY PETERSON,

Defendant-Appellant.

ORDER

Appellant filed a petition for rehearing and rehearing en banc.

The panel voted to deny the petition for rehearing. Accordingly, the petition for rehearing is denied.

A member of the Court requested a poll on the petition for rehearing en banc. Chief Judge Williams and Judges Wilkinson, Niemeyer, Traxler, King, Shedd,

Duncan, and Agee voted to deny rehearing en banc. Judges Michael, Motz, and Gregory voted to grant rehearing en banc.

Because the poll on rehearing en banc failed to produce a majority of judges in active service in favor of rehearing en banc, the petition for rehearing en banc is denied.

Judge Motz wrote an opinion dissenting from the denial of rehearing en banc.

OPINION

DIANA GRIBBON MOTZ, Circuit Judge, dissenting from the denial of rehearing en banc:

In my view, by refusing to grant Jason Landis Linder habeas relief, a panel of this court has not only seriously erred, but also utterly failed to vindicate our Constitution's promise of equal justice under law.

No one disputes the following facts. The district court, adhering to then-mandatory federal Sentencing Guidelines, more than doubled Linder's sentence on the basis of facts never found by a jury. Shortly thereafter, in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), the Supreme Court held such sentences unconstitutional. The rule established in *Booker* applies to Linder because his conviction was not final until more than a year after *Booker* issued. But because Linder waived his right to a direct appeal, we

dismissed his direct appeal on that ground. *See United States v. Linder*, 174 Fed.Appx. 174 (4th Cir.2006) (unpublished). Linder then filed a timely petition for habeas relief pursuant to 28 U.S.C. § 2255 (2006), seeking a remand for resentencing under *Booker*. Linder has *never* waived his right to habeas relief.

Notwithstanding these undisputed facts, the panel has chosen to ignore Linder's concededly unconstitutional sentence and deny him all habeas relief, reasoning that to do otherwise would "circumvent" the dismissal of his direct appeal. *United States v. Linder*, 552 F.3d 391, 396 (4th Cir.2009). This rationale offers precious little support for the panel's decision to leave in place Linder's unconstitutional sentence. In fact, granting Linder's request on habeas-a remand for resentencing-"circumvents" nothing because Linder's *Booker* claim was never considered, let alone fully and fairly considered, on direct appeal. Instead, Linder's direct appeal was *dismissed* without resolution, or even discussion, of the merits of his *Booker* claim.

Moreover, in holding that Linder has somehow defaulted his right to habeas relief, the panel must rely on an argument that was itself defaulted by the Government's failure to raise it in the district court. When habeas *petitioners* have sought to advance such defaulted arguments, this court has steadfastly refused to consider them. Allowing the Government to prevail on an argument that it defaulted seems to me the antithesis of the equal justice under law guaranteed by our Constitution. This unequal treatment works a

particularly inequitable result here given the contemporaneous statement of the sentencing court that, if not bound by the then-mandatory Sentencing Guidelines, it would have sentenced Linder to less than half the twenty-two year sentence that the Guidelines then required.

I.

Linder pled guilty to conspiracy to possess heroin with intent to distribute it in violation of 21 U.S.C. §§ 841(a)(1), 846 (2006). In doing so he waived his right to file a *direct* appeal; he did not, however, waive his right to habeas corpus relief pursuant to 28 U.S.C. § 2255 (2006).[1]

---

1. The written plea agreement indicates that both parties—Linder and the Government—recognized that Linder's waiver of his right to challenge his conviction and sentence on direct appeal did not, and was not intended to, waive his right to do so on habeas. The agreement expressly provides that it "constitutes the complete plea agreement between [the parties]," and it contains no waiver of Linder's habeas rights to challenge his conviction or sentence. In contrast, the plea agreement contains an express waiver of both "direct appeal" and "habeas corpus" rights with respect to any forfeiture. Thus, when the parties intended to agree to a waiver of habeas corpus rights, they explicitly said so. The Government knows how to include an express habeas waiver in a plea agreement when parties agree to one. *See, e.g., United States v. Lemaster*, 403 F.3d 216, 218 (4th Cir.2005) (quoting plea agreement containing express provision that the defendant "waive[s] any right . . . to collaterally attack [the] conviction and/or sentence imposed"). But the Government did not do so here.

Appendix E

After Linder's plea, but before his sentencing, the Supreme Court decided *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), which held Washington's mandatory sentencing system unconstitutional. In the wake of *Blakely*, an *en banc* majority of this court held that *Blakely* did *not* apply to the mandatory federal Sentencing Guidelines and so upheld their constitutionality. *United States v. Hammoud*, 378 F.3d 426, 426 (4th Cir.2004), *vacated*, 543 U.S. 1097, 125 S.Ct. 1051, 160 L.Ed.2d 997 (2005). Recognizing the closeness of the question, however, we suggested that, in addition to a sentence pursuant to the mandatory Guidelines, sentencing courts "also announce . . . a sentence . . . treating the guidelines as advisory only." *Id.*

In accord with this suggestion, when sentencing Linder the district court explained that the mandatory Guidelines required a sentence of 262 months in prison, but that if "not confined by the sentencing guidelines in this case, the Court would impose a sentence in this case of 120 months." Thus, the sentencing court concluded that a sentence of ten years was the appropriate punishment under 18 U.S.C. § 3553(a) (2006)-rather than the sentence of almost twenty-two years imposed because of the then-mandatory Guidelines. Indeed, the criminal judgment sentencing Linder to a term of imprisonment expressly includes this "alternative sentence," rendered "pursuant to 18 U.S.C.A. § 3553(a)."

Given the district court's "alternative sentence," Linder understandably filed a direct appeal to this court,

notwithstanding his waiver of this right.[2] While Linder's direct appeal was pending before us, the Supreme Court decided *Booker* and overruled *Hammoud.* In *Booker*, the Supreme Court squarely held that mandatory federal Guidelines—and sentences imposed pursuant to them—violate the Sixth Amendment right to trial by jury. 543 U.S. at 244, 125 S.Ct. 738. The Court made its holding in *Booker* retroactive to all cases " 'pending on direct review or not yet final,' " *id.* at 268, 125 S.Ct. 738 (*quoting Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987)), recognizing that resentencing rights would be subject to "ordinary prudential doctrines." *Id.* In accord with one such "prudential doctrine"—Linder's waiver of his right to bring a direct appeal-we dismissed Linder's direct appeal. *See Linder*, 174 Fed.Appx. at 175-76. The Supreme Court subsequently denied certiorari. *Linder v. United States*, 549 U.S. 938, 127 S.Ct. 328, 166 L.Ed.2d 245 (2006).

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2. At the time Linder filed his direct appeal, it was quite possible that, were *Booker* to be decided in Linder's favor, we might have later held that plea agreements cannot waive constitutional *Booker* claims. *See United States v. Marin*, 961 F.2d 493, 496 (4th Cir.1992) (defendants cannot waive challenges to sentences imposed "based on a constitutionally impermissible factor"). Although we subsequently rejected this argument, *see United States v. Blick*, 408 F.3d 162, 169-73 (4th Cir.2005), Linder's appeal was certainly reasonable. The Government's suggestion that Linder should somehow be faulted for "breaching" his plea agreement thus rings hollow. Linder was entitled to appeal, despite the appellate waiver, if only to challenge the enforceability of that waiver. *See United States v. Johnson*, 410 F.3d 137, 151 (4th Cir.2005).

Appendix E

While Linder's petition for certiorari was pending, he filed a *pro se* "Memorandum in Aid of Sentencing" requesting that the district court impose the "alternative" ten-year sentence contained within its original judgment. The district court construed this as a petition for habeas relief pursuant to 28 U.S.C. § 2255 (2006). The Government opposed the petition, arguing that Linder could not prevail because his conviction was final prior to *Booker*, and *Booker* did not apply "to habeas proceedings involving defendants whose convictions have become final" before *Booker* issued. The district court denied Linder habeas relief on this ground, finding that his "conviction was final before *Booker*."

By adopting the Government's argument and so holding, the district court clearly erred.[3] Yet, in response to Linder's *pro se* petition to alter the district court's judgment, which pointed out this error, the Government claimed that any error had been "invited" *by Linder* and so he could not "complain" about it. Once again the Government did *not* argue that Linder's waiver of his right to a direct appeal in any way foreclosed his ability to obtain habeas relief; instead, the Government addressed Linder's habeas arguments on the merits. The district court denied Linder's *pro se* petition to alter the judgment, again adopting the Government's erroneous argument.

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3. As the panel properly recognized, Linder's conviction did not become final until the denial of his petition for certiorari on October 2, 2006—more than a year and a half *after* the Supreme Court decided *Booker*. *See Clay v. United States*, 537 U.S. 522, 527, 123 S.Ct. 1072, 155 L.Ed.2d 88 (2003).

Linder then filed a timely *pro se* petition for a certificate of appealability with this court, contending that the district court erred in denying his habeas petition on the ground that his conviction was final before *Booker* was decided. We granted the certificate of appealability on "the issue of whether the district court erred in ruling that Linder's conviction was final before *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), and that *Booker* was not available to Linder." Only *then* did the Government raise, for the first time, its new argument that Linder's waiver of appellate rights also precluded his right to habeas relief.[4] The panel affirmed on this ground alone. *See Linder*, 552 F.3d at 396-97.

Clearly, Linder did waive his right to challenge his sentence *on direct appeal.* But, just as clearly, Linder *never* waived his right to bring a collateral challenge to his sentence under § 2255. Indeed, by failing to contend that Linder waived his right to habeas relief in the district court, the Government waived this waiver argument.

Section 2255 commands that we provide relief to a habeas petitioner when his "sentence was imposed in violation of the Constitution." 28 U.S.C. § 2255(a)-(b) (2006). As the Government and the panel acknowledge,

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4. The Government has abandoned the arguments it made to the district court and now relies *solely* on Linder's appeal waiver as the basis for denying him habeas relief. Neither the Government nor the panel provides any other reason why *Booker* does not compel a remand for resentencing here.

Linder's sentence clearly violates the Constitution. This should be the end of the matter. We should, as we have in other cases, grant the petition for relief and remand for resentencing. *See, e.g., United States v. Hughes*, 401 F.3d 540, 543-44 (4th Cir.2005) (remanding for resentencing when the defendant's sentence was imposed in violation of *Booker*); *United States v. Pasquantino*, 230 Fed.Appx. 255, 256-57 (4th Cir.2007) (approving resentencing upon § 2255 petition when convictions were not final before *Booker*) (unpublished).

II.

The panel, however, denies Linder this habeas relief because it concludes that "Linder may not circumvent a proper ruling on his *Booker* challenge on direct appeal by re-raising the same challenge in a § 2255 motion." *See Linder*, 552 F.3d at 396-97 (*citing Boeckenhaupt v. United States*, 537 F.2d 1182, 1183 (4th Cir.1976) (per curiam)).

The fundamental difficulty with this rationale is that Linder's habeas petition does not "circumvent" any direct appeal "ruling on his *Booker* challenge." This court, on direct appeal, never issued a ruling on Linder's *Booker* challenge; we simply dismissed the case because of Linder's appeal waiver. The panel's reliance on *Boeckenhaupt* is thus misplaced. The bar against relitigation established by that case only applies to claims "fully considered" in a prior direct appeal. *Boeckenhaupt*, 537 F.2d at 1183. As we explained in *Blick*, another case relied on by the panel, an appellate

waiver requires us to "dismiss[ ] the appeal *without addressing the merits*." *Blick*, 408 F.3d at 167-68 (emphasis added). Thus, when we dismissed Linder's direct appeal we did not "fully consider" or "address[ ] the merits" of his *Booker* claim; rather, we expressly *refused* to consider the merits of that claim. *See Linder*, 174 Fed.Appx. at 175-76.[5]

Neither the panel nor the Government has cited any case that has held, as the panel does here, that a dismissal of an appeal constitutes a "full consideration" on the merits that bars collateral review. As the Seventh Circuit has explained, "[a]n issue previously raised on direct appeal cannot be relitigated in a Section 2255 proceeding *only* if the issue was *resolved on the merits*. . . ." *Kramer v. United States*, 788 F.2d 1229, 1231 (7th Cir.1986) (emphasis added); *see also United States v. Davis*, 406 F.3d 505, 511 (8th Cir.2005) (section 2255 relitigation bar applies to claims "raised *and decided* " on direct appeal) (quotation omitted) (emphasis added); *Argencourt v. United States*, 78 F.3d 14, 16 n. 1 (1st

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5. We have routinely made this distinction in cases involving ineffective assistance of counsel. Indeed, when dismissing such a claim on direct appeal as premature, we have expressly noted that it may be later litigated in a § 2255 motion, presumably because dismissal did not address the merits of the claim. *See, e.g., United States v. Bartram*, 407 F.3d 307, 311 n. 2 (4th Cir.2005); *United States v. Williams*, 977 F.2d 866, 871 (4th Cir.1992); *compare Fuller v. United States*, 398 F.3d 644, 648-49 (7th Cir.2005) (relitigation bar does apply when ineffective assistance claim was "decided [on] the merits" on direct appeal).

Cir.1996) (same). On direct appeal, we never addressed—let alone resolved—the merits of Linder's *Booker* claim. Of course, if we had, Linder would have undoubtedly obtained a remand for resentencing. *See Hughes*, 401 F.3d at 543-44.

The panel opinion thus eliminates Linder's collateral challenge rights even though he never agreed to waive those rights. The Government itself candidly acknowledges that this result seems to "smuggle[ ] in the benefits of a § 2255 waiver without an express § 2255 waiver." Response of the United States to Petition for Rehearing *En Banc* at 10. The panel's holding does precisely that, erasing the clear distinction-which we and other courts have long recognized-between waivers of *only* direct appeal rights and waivers of *both* direct appeal and habeas rights. *See, e.g., Lemaster*, 403 F.3d at 220; *Garcia,Santos v. United States*, 273 F.3d 506, 509 (2d Cir.2001). Moreover, the panel's holding conflicts with the settled rule that criminal defendants may only waive habeas rights *expressly. See, e.g., United States v. Pruitt*, 32 F.3d 431, 433 (9th Cir.1994) ("A plea agreement does not waive the right to bring a § 2255 motion unless it does so expressly. The government gets what it bargains for but nothing more."); *accord United States v. Cockerham*, 237 F.3d 1179, 1183 (10th Cir.2001); *Allen v. Thomas*, 161 F.3d 667, 670-73 (11th Cir.1998).

In sum, Linder's waiver of his right to bring a direct appeal does not foreclose his habeas claim. The panel erred in holding that it does.

Appendix E

III.

Even if Linder's waiver of appellate rights did somehow also waive his habeas rights, the panel opinion fails for a more fundamental reason: the Government *did not raise* this argument in the district court. Rather, the Government asserted that Linder's appeal waiver barred § 2255 habeas relief for the first time in this appeal. We have long held—as have our sister circuits—that "the government's failure to raise [a] waiver as a procedural bar" constitutes "a waiver of the waiver." *United States v. Metzger*, 3 F.3d 756, 757 (4th Cir.1993); *accord United States v. Ware*, 416 F.3d 1118, 1121 (9th Cir.2005); *United States v. Hicks*, 945 F.2d 107, 108 (5th Cir.1991). In short, "the government forfeited its right to rely on the appeal-waiver provision by failing to raise the issue in the district court." *Hunter v. United States*, 160 F.3d 1109, 1114 (6th Cir.1998).

The panel opinion completely ignores this well-established rule, to render an unnecessary—and unjust—result. A habeas petitioner like Linder procedurally defaults his claim unless he raises it at sentencing, on direct appeal, *and* in the district court when seeking habeas relief. *See United States v. Harris*, 183 F.3d 313, 317 (4th Cir.1999). Fundamental fairness requires that the Government not prevail on an argument that we would surely reject as defaulted if not raised by a petitioner until this late stage.

Instead, without even a nod at this inequity, the panel determines to overlook the Government's default

because it believes that, given the "unique circumstances of this case," to do otherwise would "effectively ... revers[e] our prior decision on direct appeal." *Linder*, 552 F.3d at 396 n. 2. As explained above, affording Linder habeas relief does not in any way "reverse" the prior decision on Linder's direct appeal because that decision *dismissed* Linder's appeal and did not address its merits.

Moreover, and perhaps more importantly, the most critical "unique circumstance" in this case is the conceded fact that Linder's sentence violates the Constitution. Rather than justifying a denial of habeas relief, this "circumstance" provides a powerful reason for granting such relief and refusing to ignore the Government's default.[6]

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6. Compounding the injustice here is the panel's disregard of the statutorily defined scope of our review. On appeal from the denial of a § 2255 petition, this court is empowered to consider only the "specific issue or issues" set forth in the certificate of appealability. 28 U.S.C. § 2253(c)(3) (2006). Here, the certificate of appealability set forth a *single* issue. Thus, the panel ordered that: "[a] certificate of appealability is granted on *the issue* of whether the district court erred in ruling that Linder's conviction was final before *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), and that *Booker* was not available to Linder for post-conviction relief on his Sixth Amendment claim" (emphasis added). The panel then ordered "briefing on this issue," deferring "action on *any additional issues* pending a review of the case on the merits" (emphasis added).

(Cont'd)

IV.

To reach its desired result, the panel must not only hold that a dismissal based on an appeal waiver somehow constitutes an adjudication on the merits precluding habeas review, but also exempt the Government from the usual rules barring consideration of arguments not properly raised. I cannot understand why the panel strains to ensure that a man's unconstitutional sentence remains in place, and why a majority of my colleagues refuse to correct this injustice.

(Cont'd)

The panel, having never ordered briefing or granted a certificate of appealability on any other issue, found that the district court indeed erred on the only issue properly before it. But instead of applying *Booker* to Linder's sentence, the panel went beyond the single issue set forth in the certificate of appealability—and, indeed, beyond any argument that was actually made in the district court—to deny Linder habeas relief. When habeas petitioners raise arguments outside the certificate of appealability, we routinely refuse to consider them. *See, e.g., Griggs v. Maryland*, 263 F.3d 355, 359 n. 2 (4th Cir.2001). In doing so, we adhere to the statutory mandate of § 2253(c)(3) that "appellate review is limited to the issues specified in the certificate of appealability." *Carter v. Hopkins*, 151 F.3d 872, 874 (8th Cir.1998); *see also Murray v. United States*, 145 F.3d 1249, 1250-51 (11th Cir.1998); *Lackey v. Johnson*, 116 F.3d 149, 152 (5th Cir.1997). Again, simple justice seems to me to require that we apply this principle equally when the Government attempts to raise issues outside those stated in the certificate of appealability.

Appendix E

Twelve years of a man's life ought to trump any imagined tension between dismissal of Linder's direct appeal and a grant of habeas relief to him. Indeed, permitting this unconstitutional sentence to stand may well constitute the sort of "miscarriage of justice" that we could and should correct *even if* the Government had not defaulted its waiver argument. *See United States v. Johnson*, 410 F.3d 137, 151 (4th Cir.2005).

With respect, and great regret, I dissent from the court's refusal to rehear this case *en banc*.

APPENDIX F — RELEVANT STATUTE

Title 28, United States Code, Section 2255 (2006)

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

* * * *

No. 08-1575

In the Supreme Court of the United States

JASON LANDIS LINDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's waiver of his right to take a direct appeal of his sentence, followed by the dismissal of his direct appeal by virtue of that waiver, barred him from reasserting his objection to the mandatory application of the Sentencing Guidelines under *United States* v. *Booker*, 543 U.S. 220 (2005), in postconviction proceedings under 28 U.S.C. 2255.

2. Whether the court of appeals permissibly relied on the direct appeal waiver in affirming the denial of petitioner's Section 2255 motion when the government had not relied on that waiver in the district court.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 552 F.3d 391. The opinions of the district court (Pet. App. 14a-17a, 18a-22a) are unreported. A prior opinion of the court of appeals in this case (Pet. App. 23a-26a) is not published in the Federal Reporter but is available at 174 Fed. Appx. 174.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2009. A petition for rehearing was denied on March 24, 2009 (Pet. App. 27a-41a). The petition for a writ of certiorari was filed on June 22, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Virginia, petitioner was convicted of conspiracy to possess with intent to distribute one kilogram of heroin, in violation of 21 U.S.C. 846, 841(a)(1) and (b)(1)(A). He was sentenced to 262 months of imprisonment, to be followed by five years of supervised release. The court of appeals dismissed his appeal based on his waiver of his right to take a direct appeal, and this Court denied certiorari. Petitioner then filed a motion under 28 U.S.C. 2255, which the district court denied. The court of appeals affirmed. Pet. App. 1a-13a.

1. Petitioner and others were involved in a heroin distribution ring in and around Norfolk, Virginia. On February 9, 2004, a grand jury in the Eastern District of Virginia returned an indictment charging petitioner with one count of conspiring to distribute and possess with the intent to distribute one kilogram or more of heroin, in violation of 21 U.S.C. 846, 841(a)(1) and (b)(1)(A). C.A. App. 10-31.

Petitioner pleaded guilty pursuant to a written plea agreement. Pet. App. 2a. In exchange for his guilty plea, the government agreed not to seek an enhanced sentence by virtue of his prior convictions. C.A. App. 52-53. The plea agreement also included a provision titled "Waiver of Appeal and Review," which provided that, "in exchange for the concessions made by the United States in this plea agreement," petitioner "knowingly waive[d] the right to appeal the conviction and any sentence within the maximum provided in the statute of conviction * * * on the grounds set forth in Title 18, United States Code, Section 3742 or on any ground whatsoever." Pet. App. 2a-3a (emphasis omitted) (reprinting

provision). At the ensuing change-of-plea hearing, the district court conducted the colloquy required by Fed. R. Crim. P. 11, during which petitioner stated that he had signed the agreement, initialed the bottom of each page, read each paragraph, discussed the agreement with his counsel, and fully understood its terms. Pet. App. 3a-4a. He also specifically acknowledged that he was waiving his right to appeal any sentence within the statutory maximum. *Id.* at 3a. The court accepted petitioner's plea. *Id.* at 3a-4a.

After petitioner's guilty plea but before sentencing, this Court held that the Sixth Amendment right to a jury trial was violated by increasing a defendant's sentence under a state guidelines scheme based on a fact concerning the offense found by the judge at sentencing. *Blakely* v. *Washington*, 542 U.S. 296 (2004). In light of the doubt *Blakely* cast on the mandatory application of the federal Sentencing Guidelines, several courts of appeals, including the Fourth Circuit, instructed district courts to "continue sentencing defendants in accordance with the guidelines, as was the practice before *Blakely*," while also recommending that, "[i]n the interest of judicial economy," district courts should "also announce, at the time of sentencing, a sentence * * * treating the guidelines as advisory only." *United States* v. *Hammoud*, 378 F.3d 426, 426 (4th Cir. 2004) (en banc), vacated, 543 U.S. 1097 (2005).

Petitioner's offense of conviction subjected him to a mandatory minimum sentence of ten years of imprisonment. See 21 U.S.C. 841(b)(1)(A)(i). Based solely on the one kilogram of heroin admitted by petitioner in his guilty plea, petitioner's base offense level under the Sentencing Guidelines would have been 32, see United States Sentencing Guidelines § 2D1.1(c)(4), but at sen-

tencing, the district court accepted the Presentence Report's attribution to him of additional amounts of controlled substances, resulting in a base offense level of 34, see Pet. 6 n.2; C.A. App. 151, 247. After resolving various objections and applying adjustments for petitioner's leadership role in the offense and acceptance of responsibility, the district court calculated a total offense level of 35 and a criminal history Category of V, resulting in a guidelines range of 262 to 327 months of imprisonment. Pet. App. 5a-6a; C.A. App. 151-152. The court imposed a 262-month sentence, but, following *Hammoud*, stated that "[i]n the event [it] was not confined by the sentencing guidelines in this case, the Court would impose a sentence of 120 months." Pet. App. 6a (first pair of brackets in original) (citation omitted).

2. Despite his waiver of direct appeal, on October 14, 2004, petitioner filed a timely notice of appeal, seeking to challenge his sentence based on *Blakely*. While that appeal was pending, this Court held that because the Sentencing Reform Act of 1984 (Sentencing Reform Act), Pub. L. No. 98-473, 98 Stat. 1987, made the federal Sentencing Guidelines mandatory, a Guidelines sentence that is enhanced based on facts found by the judge violates the Sixth Amendment jury trial right. *United States* v. *Booker*, 543 U.S. 220, 230-244 (2005). To remedy the Sentencing Guidelines' constitutional defect, the Court invalidated provisions of the Sentencing Reform Act that made the Guidelines mandatory, 18 U.S.C. 3553(b), 3742(e), thereby "mak[ing] the Guidelines effectively advisory." *Booker*, 543 U.S. at 245.

On April 5, 2006, the court of appeals granted the government's motion to dismiss petitioner's appeal based on the appeal waiver in his plea agreement. Pet. App. 23a-26a. The court observed that petitioner did not

contend that the district court "failed to question" him about the waiver, or that he did not understand its significance, or that his sentence exceeded the statutory maximum, or that the government in any way breached the agreement. *Id.* at 25a. The court rejected petitioner's argument that the language of the waiver did not extend to challenges based on *Blakely* and *Booker*, and it enforced the appellate waiver by dismissing the appeal. *Id.* at 23a-26a. The court of appeals denied a petition for rehearing, C.A. App. 176-177, and this Court denied certiorari, *Linder* v. *United States*, 549 U.S. 938 (2006).

3. On July 13, 2006, petitioner filed a pro se "Memorandum in Aid of Sentencing" in the district court, asking it to vacate the 262-month sentence and impose the alternative 120-month sentence based on *Booker*. C.A. App. 183-185. In accordance with the procedures outlined in *Castro* v. *United States*, 540 U.S. 375 (2003), the district court notified petitioner that it intended to construe his submission as a motion to vacate, set aside or correct his sentence under 28 U.S.C. 2255. C.A. App. 188-192. Petitioner indicated through counsel that he did not oppose that course of action. *Id.* at 194.

The district court denied petitioner's request for imposition of the alternative sentence on the ground that *Booker* was not retroactively applicable to prisoners whose convictions "became final before *Booker* was decided." Pet. App. 21a. The court held that petitioner's conviction became final in October 2004, following the entry of judgment by the district court. Accordingly, the court concluded that *Booker* did not apply to petitioner. *Id.* at 21a-22a. Petitioner filed a motion to alter or amend the judgment, arguing that his conviction had not become final when *Booker* was announced because

he timely filed a notice of appeal from the judgment. The district court denied that motion. *Id.* at 17a.

4. The court of appeals affirmed. Pet. App. 1a-13a. As an initial matter, the court of appeals agreed with petitioner that "his conviction was not 'final' until [this Court] denied certiorari," in October 2006. *Id.* at 10a. Accordingly, the court of appeals concluded because *Booker* was decided in January 2005, the district court erred in disposing of petitioner's Section 2255 motion on the ground that he sought retroactive application of *Booker*. *Ibid.*; see also *Booker*, 543 U.S. at 268 ("[W]e must apply today's holdings—both the Sixth Amendment holding and our remedial interpretation of the Sentencing [Reform] Act—to all cases on direct review.") (citing *Griffith* v. *Kentucky*, 479 U.S. 314, 328 (1987)). The court also noted that petitioner's appellate-review waiver precluded him only from bringing a direct appeal and did not include a waiver of "his right to seek collateral review under [Section] 2255." Pet. App. 3a n.1.

The court of appeals nonetheless affirmed the district court's judgment on different reasoning. Pet. App. 11a-13a. The court observed that "on direct appeal" petitioner had "challenged his sentence based on *Blakely* and *Booker*," *id.* at 11a, even though his challenge was ultimately deemed to be "within the scope of his plea agreement's knowing and voluntary direct appeal waiver." *Id.* at 11a-12a. The court concluded that petitioner "may not circumvent a proper ruling on his *Booker* challenge on direct appeal by re-raising the same challenge in a [Section] 2255 motion." *Id.* at 12a.[1]

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[1] Petitioner posited that the government waived the argument that the direct-appeal waiver served as a procedural bar to collateral relief

The court of appeals denied petitioner's petition for rehearing en banc, see Pet. App. 27a-28a, with three judges voting for rehearing en banc, one of whom filed a dissent. The dissenting judge would have found no procedural impediment to petitioner's pursuit of relief under Section 2255, because his appeal waiver was limited to a direct appeal and did not extend to a Section 2255 motion, and his case was not final when *Booker* was decided. The dissent also believed that the government had waived its right to rely on petitioner's waiver by failing to raise the argument in the district court. On the merits, Judge Motz concluded that petitioner's 262-month could not stand consistent with *Booker*. *Id.* at 28a-41a.

ARGUMENT

Petitioner asks this Court to review (1) the court of appeals' application of what he terms the doctrine of "collateral estoppel" (Pet. 13) to bar him from obtaining review of the merits of his claim, and (2) "to decide whether * * * *Day v. McDonough*, 547 U.S. 198 (2006), should apply to [Section] 2255 proceedings," Pet. 19. On the first question, the court of appeals' reasoning, properly understood, is sound and its judgment is correct. Moreover, this case does not suitably present any question of wide importance. The second question is not presented by this case, nor is there any published appellate authority on the question, let alone a split in the circuits.

1. The court of appeals reasoned that, because petitioner's challenge to the mandatory application of the Sentencing Guidelines on direct appeal was dismissed on

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by failing to raise that asserted bar before the district court. But given "the unique circumstances of this case," the court of appeals concluded it would consider the argument even if it was waived. Pet. App. 12a n.2.

the basis of his waiver of appeal, he could not "re-rais[e] the same challenge in a [Section] 2255 motion." Pet. App. 11a-12a. The court elaborated by stating that petitioner could not "circumvent a proper ruling on his *Booker* challenge on direct appeal by re-raising the same challenge in a [Section] 2255 motion." *Id.* at 12a. Petitioner interprets that holding as an application of a "collateral estoppel bar."[2] Pet. 10-12, 13-19. But the court of appeals did not use that terminology, and it does not appear that the court applied that doctrine. Rather, the court of appeals' decision is better understood as holding that petitioner's waiver of further direct review of his sentencing claim prevents him from freely raising it on collateral review. So understood, the court of appeals' reasoning and judgment are correct. In any event, this case would not be a suitable vehicle for addressing the legal issues arising from the unusual facts of this case, let alone addressing any broader questions of preclusion law that petitioner claims are presented here.

a. In *Sanders* v. *United States*, 373 U.S. 1 (1963), this Court established that a previous federal determination of a claim on collateral review is controlling in a subsequent round of collateral review if "(1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application." *Id.* at 15. In

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[2] Collateral estoppel, or issue preclusion, bars relitigation of an issue of fact or law that was actually litigated and determined by a valid final judgment, where that determination was essential to that judgment. See *Bobby* v. *Bies*, 129 S. Ct. 2145, 2152 (2009); Restatement (Second) of Judgments § 27 (1982).

Davis v. *United States*, 417 U.S. 333 (1974), the Court recognized that *Sanders*' bar to relitigation on collateral review extends to claims that were determined on direct review. *Davis* further held, however, that one of *Sanders*' exceptions to the bar on relitigation of claims—specifically, an intervening change of law—applies when a claim was initially raised and resolved on direct appeal and is asserted again in an initial motion under Section 2255. *Id.* at 342. *Davis* thus establishes that in federal criminal prosecutions, law-of-the-case principles apply to claims resolved on direct appeal and then reasserted in a motion under Section 2255. See *ibid.*; see also *Reed* v. *Farley*, 512 U.S. 339, 358 (1994) (Scalia, J., concurring in part and concurring in the judgment) ("[C]laims will ordinarily not be entertained under [Section] 2255 that have already been rejected on direct review."); *Withrow* v. *Williams*, 507 U.S. 680, 721 (1993) (Scalia, J., concurring in part and dissenting in part) ("[F]ederal courts have uniformly held that, absent countervailing considerations, district courts may refuse to reach the merits of a constitutional claim previously raised and rejected on direct appeal.").

In the court of appeals, the government argued that, because petitioner "litigated his Sixth Amendment issue on direct appeal and lost," petitioner "may not revive it in a [Section] 2255 motion." Gov't C.A. Br. 10. That argument in part relied on the Section 2255 relitigation bar. See *id.* at 11 (citing, *inter alia*, *Boeckenhaupt* v. *United States*, 537 F.2d 1182, 1183 (4th Cir.), cert. denied, 429 U.S. 863 (1976), to support the proposition that "because [petitioner] did raise and lost his Sixth Amendment claim in his direct appeal, he may not relitigate that issue now").

Application of that bar, however, depends on a prior ruling on the merits. See *Davis*, 417 U.S. at 342. Petitioner did not receive a determination of his sentencing claim on the merits in his direct appeal, because that appeal was dismissed based solely on the appellate waiver. Pet. App. 25a-26a. As the dissenting judge below noted, a valid appeal waiver cannot be deemed a ruling on the merits since the very consequence of the waiver is a dismissal of the appeal "*without addressing the merits*." *Id.* at 35a-36a (quoting *United States* v. *Blick*, 408 F.3d 162, 167-168 (4th Cir. 2005)).[3]

b. In the court of appeals the government also argued that an additional consideration weighing against petitioner's claim was that a defendant "who could have raised a constitutional issue on direct appeal, but failed to raise it, would have defaulted on that claim in a [Section 2255 proceeding]," and petitioner's "conscious choice to give up his right to appeal in exchange for a plea agreement should not place him in a better position." Gov't C.A. Br. 11-12. That argument does not depend on a prohibition against relitigating claims already decided on the merits, but rather on the principle that a defendant who expressly surrenders his right to take an appeal in return for concessions by the govern-

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[3] The government did not rely on a relitigation bar based on the *district court's* action in ruling on the merits of petitioner's Sixth Amendment claim. Such a bar may apply to unappealed claims. See, *e.g.*, *Kaufman* v. *United States*, 394 U.S. 217, 227 n.8 (1969) (relief may be denied under Section 2255 "where the trial *or* appellate court has had a 'say' on a federal prisoner's claim") (emphasis added). But it would not apply here because of the unusual circumstance that petitioner's Section 2255 motion relies on a change in law since the district court's decision, see *Davis*, *supra*, yet is not barred by the non-retroactivity rule of *Teague* v. *Lane*, 489 U.S. 288, 310 (1989) (opinion of O'Connor, J.).

ment should not be better off than another defendant who simply defaults his appeal. Both situations implicate the longstanding principle that "[s]o far as convictions obtained in the federal courts are concerned, the general rule is that the writ of *habeas corpus* will not be allowed to do service for an appeal." *Sunal* v. *Large*, 332 U.S. 174, 178 (1947). Petitioner's waiver of appeal therefore requires that he show at least what a defendant would need to show in order to overcome an ordinary procedural default.

In *Kaufman* v. *United States*, 394 U.S. 217 (1969), this Court expressly contemplated the denial of Section 2255 relief to a federal prisoner who forewent a direct appeal: "[T]he [Section] 2255 court may in a proper case deny relief to a federal prisoner who has deliberately bypassed the orderly federal procedures provided * * * by way of appeal—*e.g.*, * * * appeal under [Fed. R. App. P.] 4(b)." *Id.* at 227 n.8. Similarly, the Court explained in *Bousley* v. *United States*, 523 U.S. 614, 621 (1998), that "the voluntariness and intelligence of a guilty plea can be attacked on collateral review only if first challenged on direct review." There, the defendant "contested his sentence on appeal, but did not challenge the validity of his plea. In failing to do so, [he] procedurally defaulted the claim he now presses." *Ibid.* See also *Johnson* v. *United States*, 838 F.2d 201, 202 (7th Cir. 1988) (Easterbrook, J.) ("[F]orgoing an appeal bars collateral review of appealable issues."); *United States* v. *Pipitone*, 67 F.3d 34, 38 (2d Cir. 1995) (applying procedural default principles to a "party who fails to raise an issue on direct appeal and subsequently endeavors to litigate the issue via a [Section] 2255 petition").

The court of appeals recognized this line of authority by supporting its holding with a citation to a treatise's

discussion of the consequences for collateral review of waiving direct appeal in federal criminal prosecutions. Pet. App. 12a-13a (citing Brian R. Means, *Federal Habeas Practitioner Guide* Jurisdiction ¶ 1.23.0 (2006-2007) ("Where the [habeas] petitioner only waives the right to appeal, he is not precluded from filing a petition for collateral review. * * * But he is precluded from raising claims that are the sort that *could have* been raised on appeal.")). The court of appeals followed that citation with a "*cf.*" citation to several cases applying the relitigation bar, including *Boeckenhaupt*, *supra*. Pet. App. 13a. The court's references to those cases as analogous authority, rather than directly supportive authority, confirms that the court did not treat this case as controlled by a prior merits determination of petitioner's challenge to the mandatory application of the Sentencing Guidelines. To the contrary, the court of appeals correctly applied the principle that, when a defendant waives his direct appeal, a motion under Section 2255 cannot "do service for an appeal." *Sunal*, 332 U.S. at 178.

c. Petitioner contends (Pet. 18) that under the court of appeals' decision, "every defendant who waives a right to a direct appeal effectively waives all rights of review." That is incorrect. Most obviously, such a defendant has not waived claims that could not, or normally would not, be raised on direct appeal at all. See, *e.g.*, *United States* v. *Baramdyka*, 95 F.3d 840, 844 (9th Cir. 1996) (holding defendant's waiver of right to appeal did not waive his right to raise claims of ineffective assistance of counsel in a Section 2255 proceeding), cert. denied, 520 U.S. 1132 (1997); see generally *Massaro* v. *United States*, 538 U.S. 500 (2003) (ineffective assistance of counsel claims need not be raised on direct appeal).

And, as a general matter, if a direct appeal waiver were treated as a form of procedural default, then a defendant may press any cognizable claim if he can make a sufficient showing to overcome his default.

Because petitioner waived his right to an appeal, he should have to meet a higher standard than the usual cause-and-prejudice standard for excusing mere procedural default. See *Johnson*, 838 F.2d at 203 ("Our case involves a considered waiver, not a default. It should be harder to rescind a conscious choice than to recoup from an unconsidered omission."). But petitioner cannot satisfy even the ordinary standard to overcome a procedural default. A defendant can present a defaulted claim "if [he] can first demonstrate either 'cause' and actual 'prejudice,' * * * or that he is 'actually innocent.'" *Bousley*, 523 U.S. at 622 (quoting *Murray* v. *Carrier*, 477 U.S. 478, 485, 496 (1986); *Wainwright* v. *Sykes*, 433 U.S. 72, 87 (1977); and *Smith* v. *Murray*, 477 U.S. 527, 537 (1986)). Petitioner has never suggested he could establish cause for excusing his well-considered and bargained-for waiver of direct appeal, nor does he make a claim of actual innocence. Nor could petitioner demonstrate cause to excuse his waiver. Under *Carrier*, "cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded [his] efforts," 477 U.S. at 488, but here the appeal waiver was a bargain petitioner himself struck.

Petitioner's failure to justify why he should be permitted to raise a claim in a Section 2255 motion that he agreed not to raise on direct appeal cannot be excused by the government's failure to rely on his appeal waiver in the district court. Petitioner had ample opportunity and incentive to argue that his waiver was not an obsta-

cle: he could have directly attacked his waiver in his Section 2255 motion on ineffective assistance of counsel or other grounds. And, once the government did raise the issue, he could have responded in his reply brief in the court of appeals. He could also have made an argument in his petition for rehearing papers (in which he even recognized the rule as "procedural default," Pet. for Reh'g 5; Pet. for Reh'g Reply 2). He did none of these. Because petitioner waived his claim about the mandatory application of the Sentencing Guidelines by foregoing an appeal, and he does not establish any reason why Section 2255 should do service for that waived appeal, the court of appeals was correct to reject petitioner's effort to present that claim on collateral review.

d. This case presents no issue of wide significance warranting this Court's review. Importantly, the issue in this case arises only because this Court's decision in *Booker* was announced while petitioner's case was on direct review, but could not be applied to his case because of his appeal waiver. When a change in law occurs, its application to the vast majority of criminal cases is controlled by the twin principles that new rules of law are applicable to criminal cases on direct review, see *Griffith* v. *Kentucky*, 479 U.S. 314, 328 (1987), but are generally not retroactive on collateral review, see *Teague*, *supra*; *Danforth* v. *Minnesota*, 128 S. Ct. 1029, 1032 & n.1 (2008). This case presents one of a very few fact patterns not resolved by those principles, so a decision from this Court on these facts would have very narrow relevance.

Petitioner argues (Pet. 13-19) that the decision below conflicts in its reasoning with a variety of collateral estoppel decisions in civil cases and relitigation bar decisions in criminal cases. As discussed above, however,

the court of appeals' opinion does not rely on collateral estoppel principles. There is therefore no reason to grant review to resolve the claimed conflict.

2. Petitioner also contends that this Court should grant review to decide whether *Day* v. *McDonough*, 547 U.S. 198 (2006)—which holds that district courts may raise sua sponte a state habeas petitioner's noncompliance with the one-year statute of limitations applicable to petitions under 28 U.S.C. 2254—"should apply to [Section] 2255 proceedings." Pet. 19. That question is not presented here, nor is there a division of authority in the courts of appeals.

To the government's knowledge, there is no published federal appellate authority whatever on the application of *Day* in Section 2255 postconviction proceedings, let alone a split in the circuits. Neither of the published appellate cases petitioner cites even concerns a Section 2255 proceeding. *Wilburn* v. *Robinson*, 480 F.3d 1140 (D.C. Cir. 2007), was a civil suit brought by a disappointed applicant for a governmental position, and does not address, let alone reject, *Day*'s applicability to federal postconviction proceedings under 28 U.S.C. 2255. Petitioner's citation (Pet. 16) to *United States* v. *Plascencia*, 537 F.3d 385, 392 n.15 (5th Cir. 2008), references a dissenting opinion on a distinct issue. The dissenting judge suggested that, because the ten-day period for filing a notice of appeal under Fed. R. App. P. 4(b)(1)(A)(i) is a nonjurisdictional claims-processing rule, the government's failure in a criminal case to object to the late filing of a notice results in a forfeiture. *Plascencia*, 537 F.3d at 391-392 (Owen, J., dissenting). In an accompanying footnote, the dissenting judge speculated that "if [*Day*'s] holding were extended by analogy, then a court of appeals might *sua sponte* ques-

tion the timeliness of a notice of appeal in a federal criminal appeal." *Id.* at 392 n.15. But neither the majority nor the dissent says anything about whether *Day* applies to a Section 2255 postconviction proceeding.

Moreover, *Day*'s application to Section 2255 proceedings is irrelevant here because the proceedings below do not parallel the proceedings in *Day*. In *Day*, the magistrate judge reviewing the state prisoner's Section 2254 petition sua sponte questioned the habeas petition's timeliness, despite the State's (erroneous) concession in its answer to the habeas petition that it was timely. 547 U.S. at 201-202. Ultimately, the magistrate judge recommended dismissal of the habeas petition, and the district court adopted that recommendation. *Id.* at 202. The question presented turned on "the authority of a U.S. District Court, on its own initiative, to dismiss as untimely a state prisoner's petition for a writ of habeas corpus." *Id.* at 201.

Unlike the petitioner in *Day*, petitioner here does not complain of the district court's actions. Rather, he objects that "the *court of appeals* overlooked the [government's] waiver" of affirmative defenses. Pet. 21-22 (emphasis added). Even assuming that the government could be faulted for not arguing its affirmative defenses in the district court,[4] the court of appeals was nonetheless entitled under ordinary principles of appellate review to affirm the district court's judgment on any ground supported by the record. See, *e.g.*, *United*

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[4] It is not clear that the government should be faulted; although the government did not raise the litigation bar or rely on the appeal waiver in its response to petitioner's Section 2255 motion, that short pro se paper gave no indication that petitioner sought anything other than retroactive application of *Booker* on collateral review, see C.A. App. 185, and the government responded accordingly, see *id.* at 202-204.

States v. *New York Tel. Co.*, 434 U.S. 159, 166 n.8 (1977). Petitioner had an opportunity to be heard on the relevance of the appeal waiver and the disposition of his direct appeal, in both his reply brief in the court of appeals and his petition for rehearing. The court of appeals was sensitive to how petitioner's motion had been litigated in the district court, and its considered judgment was that its disposition of the case was appropriate "in the unique circumstances of this case." Pet. App. 12a n.2. If *Day* has any relevance at all to proceedings in the courts of appeals, see Pet. 20, it surely requires no more than this. At bottom, petitioner seeks only review of the court of appeals' factbound exercise of its discretion to address an issue implicated by its prior enforcement of petitioner's appeal waiver. That decision does not raise a legal issue that warrants this Court's consideration.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

JASON LANDIS LINDER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF

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In the published, precedential decision issued in this case, the court of appeals announced a procedural rule (the "Litigation Bar") that, for a significant number of future petitioners, will bar access to federal collateral relief. As the Government's Brief in Opposition implicitly concedes (Opp. at 8, 12), the Litigation Bar is in fact a new rule that is without precedent in any other court. This Court should grant a writ of certiorari to review this new Litigation Bar because, among other things, the Litigation Bar appears to conflict with myriad decisions from this Court and with decisions from the other courts of appeals, and because the Litigation Bar implicates this Court's supervisory power. This case also presents a strong vehicle to decide whether the holdings of *Day v. McDonough*, 547 U.S. 198 (2006), apply to petitions filed under 28 U.S.C. § 2255 ("§ 2255"). As is clear from the Government's Opposition, both of these issues are preserved and ripe for review, and there are no jurisdictional, mootness, or other issues that would impede review by this Court.

The Government's Opposition spends little time addressing the conflicts between the holding in this case (on one hand) and the holdings in prior decisions from this Court and from the other courts of appeals (on the other hand), or the importance of resolving them. Rather, the Opposition largely avoids discussion of the conflicts through unnatural characterizations of the court of appeals' decision. As discussed below, the natural and reasonable reading of the court of appeals' decision makes clear the importance of the holding and the conflicts engendered thereby.

For these reasons, and the others discussed below, this Court should grant a writ of certiorari.

I. The Fourth Circuit's Decision Conflicts With This Court's Precedents And With Decisions Of The Other Courts Of Appeals.

With respect to the new Litigation Bar, a writ of certiorari is justified here for several reasons:

(1) An apparent conflict between a decision of a court of appeals and this Court's precedents provides a strong basis for a writ of certiorari. *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) (certiorari granted "to resolve an apparent conflict with this Court's precedents").[1] Here, the Fourth Circuit's decision appears to conflict with prior decisions from this Court. Pet. at 13-15. Specifically, the new Litigation Bar prevents re-litigation of a claim in a § 2255 petition if the claim was dismissed on direct appeal, even if the dismissal occurred without a ruling on the merits. This new Litigation Bar appears to conflict with myriad cases from this Court holding that the doctrine of collateral estoppel only bars re-litigation of claims previously resolved on the merits. *Id.*

1. *See also United States v. Doe*, 465 U.S. 605, 610 (1984) (certiorari granted "to resolve the apparent conflict between the Court of Appeals holding and the reasoning underlying this Court's holding in *Fisher*"); *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 936 (1982) (lower court opinion "appears to be inconsistent with prior decisions of this Court").

(2) The Fourth Circuit's decision in this case conflicts with the approach adopted by the other courts of appeals, which also have required a decision on the merits in order to impose a re-litigation bar like the one imposed by the Fourth Circuit here. Pet. at 16-17. The fact that other courts of appeals have not yet explicitly considered this new Litigation Bar should not sway this Court from granting a writ of certiorari. In *Begier v. Internal Revenue Service*, for example, this Court granted a writ of certiorari to review a decision by the Third Circuit in favor of the Internal Revenue Service, where two other circuits had "resolved against the taxing authorities cases presenting related issues" but where "[n]o other Court of Appeals ha[d] decided a case that presents the precise issue we decide here." 496 US. 53, 57 n.2 (1990). Similarly, in several other cases, this Court has granted a writ of certiorari where the decision of one court of appeals conflicted with the approaches — as opposed to the specific holdings — of other courts of appeals on the same issue. *See Chicago Teachers Union v. Hudson*, 475 U.S. 292, 300 (1986) (noting grant of certiorari based on "the importance of the case, and the divergent approaches of [four state appellate courts and a federal court of appeals] to the issue."); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 291 (2005) (certiorari granted "to resolve conflict among the Courts of Appeals over the scope of the *Rooker-Feldman* doctrine").

(3) The Fourth Circuit's new Litigation Bar is important and likely to have serious consequences soon. The great majority of all criminal cases are resolved

through pleas,[2] and one recent study found that two-thirds of all plea agreements contain waivers of review rights. Pet. at 11-12 n. 8. If, as the court of appeals implicitly held, every waiver of a direct appeal right effectively also waives the right to raise a claim in a petition filed under § 2255, criminal defendants who are negotiating plea agreements should be aware of this so that they can make knowing and intelligent decisions about the terms of the plea agreements and the rights they are waiving.

(4) The Fourth Circuit adopted the new Litigation Bar in an exercise of its supervisory power; this case thus requires an exercise of this Court's supervisory power over lower court proceedings. A writ of certiorari is justified because the court of appeals' decision represents a significant departure from the "accepted and usual court of judicial proceedings" on the issue of re-litigation bars. Sup. Ct. R. 10(a).

This Court also should grant a writ of certiorari to decide whether the holdings of *Day v. McDonough*, 547 U.S. 198 (2006), apply to petitions filed under § 2255. As discussed below, this is an important issue on which lower court decisions conflict.

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2. According to the United States Sentencing Commission, in 2008, 96.3% of all federal court criminal cases were resolved by a plea of guilty. In the Fourth Circuit, the figure was 95.7%. *United States Sentencing Commission, Statistical Information Packet, Fourth Circuit* (Fiscal Year 2008) at 3, *available at* http://www.ussc.gov/JUDPACK/2008/4c08.pdf (last accessed November 9, 2009).

Other circumstances justify issuance of a writ of certiorari. For example, the new Litigation Bar was announced for the first time in the panel decision (Pet. App. at 8a-13a), and the court of appeals then applied the new Litigation Bar retroactively to Mr. Linder's case. Pet. at 28-29. This case thus raises the important question of whether a new procedural rule can be applied retroactively to a pending case, to the detriment of a petitioner. *Id.* Moreover, as the Hon. Diana Gribbon Motz noted in the dissent from the court of appeals' denial of rehearing *en banc*, the court of appeals' mistaken decision has had dire consequences to Mr. Linder: "[t]welve years of a man's life ought to trump any imagined tension between dismissal of Linder's direct appeal and a grant of habeas relief to him." Pet. App. at 41a. This Court should grant a writ of certiorari to review these important issues.

II. The Government's Arguments In Opposition Are Without Merit.

1. With respect to the Litigation Bar, the Government's Opposition largely attempts to avoid discussion of the conflicts engendered by this case, by re-casting the court of appeals' decision in unnaturally narrow terms. The Government first argues that the court of appeals' decision does not appear to apply the collateral estoppel doctrine. Opp. at 8. The Opposition's circular reasoning is that because (1) the doctrine of collateral estoppel requires a prior determination on the merits, and (2) there was no prior ruling on the merits, the court of appeals could not have been applying the collateral estoppel doctrine. *Id.* at 8-12. On this point, the Government and Mr. Linder agree: Mr. Linder's

argument is that the court of appeals promulgated and applied a new variation of the collateral estoppel doctrine. While the court of appeals did not specifically use the term "collateral estoppel," it used several other terms that made clear that it was modifying the collateral estoppel doctrine. For example, the court of appeals characterized the Government as arguing that "Linder may not avoid the consequences of his appeal waiver and our prior judgment by ***reviving*** his *Booker* claim in a § 2255 motion." Pet. App. 10a (emphasis added). Then, in its holding, the court of appeals barred Mr. Linder from "***re-raising the same challenge*** in a § 2255 motion." *Id.* at 12a (emphasis added). The use of "reviving" and "re-raising" clearly invokes long-standing doctrine of collateral estoppel, which is concerned with the re-litigation of claims. Moreover, to support its holding, the court of appeals cited a number of decisions that applied the collateral estoppel doctrine. *Id.* at 13a. The natural and reasonable reading of the court of appeals' decision is that this case modifies the long-standing rule on collateral estoppel to prevent "reviving" or "re-raising" of a claim that was previously dismissed on direct appeal, even if there was no prior disposition on the merits.

Second, the Government attempts to re-cast the court of appeals' holding as one limited to waiver. Opp. at 8. This ignores the fact that the court of appeals' decision specifically found that Mr. Linder waived his right to direct appeal but that he did not waive his right to a § 2255 petition. Pet. App. 3a n.1. The court of appeals' decision repeatedly criticizes Mr. Linder's efforts to "reviv[e]" and "re-raise" his claim (Pet. App. at 10a, 12a) and thereby makes clear that its decision is based on a variation of the collateral estoppel doctrine, not waiver.

The balance of the Opposition's arguments are focused on the merits. For instance, in the third argument, the Government contends that absent the court of appeals' decision, Mr. Linder would have been better off than a petitioner who "simply defaults his appeal." Opp. at 10-11. Once again, this overlooks the court of appeals' observation that "a collateral attack is distinct from a direct appeal." Pet. App. 3a n.1. Plea agreements also correctly distinguish between the two: some defendants waive both a right to a direct appeal and a right to a § 2255 petition, while others, like Mr. Linder, only waive the right to a direct appeal while preserving the right to a § 2255 petition. *Id.* Affording Mr. Linder (and others who waive only a direct appeal) a § 2255 challenge thus provides Mr. Linder with no windfall; on the contrary, that approach merely enforces the plain terms of his plea agreement and permits Mr. Linder to exercise his statutory rights. Preserving the court of appeals' decision, however, would bestow a windfall upon the Government by preventing a defendant from filing a § 2255 petition when, as the court of appeals found, he did not waive that right in his plea agreement. Pet. App. at 3a n.1.

Fourth, the Government contends that the court of appeals' decision is correct because a § 2255 petition cannot do "service for an appeal." Opp. at 12. This argument disregards that the plain language of § 2255 specifically provides a vehicle for Mr. Linder's *Booker* challenge:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that

> ***the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law*** . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence.

See 28 U.S.C.§ 2255(a) (emphasis added). Even if one assumes that Mr. Linder waived the right to bring, in his direct appeal, his claim under *United States v. Booker*, 543 U.S. 220 (2005),[3] the plain language of § 2255 still authorizes Mr. Linder to present that claim on collateral review. Simply put, where, as here, there are two vehicles for a challenge and the Government agrees to a plea agreement in which a defendant only waives the right to use one of those vehicles, then the defendant must be allowed to use the other.

Fifth, the Government contends that because he waived the right to directly appeal his sentence, Mr. Linder should be required to meet "a higher standard than the usual cause-and-prejudice standard for excusing mere procedural default" in order to bring his *Booker* claim in his § 2255 petition. Opp. at 13. This is an unfair argument. Mr. Linder did not default on or waive his right to bring his *Booker* claim in a § 2255 petition, and thus need not demonstrate "cause and prejudice." Moreover, before the court of appeals' decision in this case was issued on January 12, 2009, no

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3. Mr. Linder had, in fact, specifically preserved his right to directly appeal the trial court's sentence. Pet. at 7 n.3.

court had held, as far as diligent research has identified, that dismissal of a claim without reaching the merits would bar "re-raising" that claim in a § 2255 petition. Mr. Linder cannot now be faulted for failing to demonstrate "cause and prejudice."

Sixth, the Government claims that review is unjustified because "[t]his case presents no issue of wide significance." Opp. at 14. However, one character of the reasons considered by the Court in granting a writ of certiorari is that a court of appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." *See* Sup. Ct. R. 10(a). Modification of the collateral estoppel doctrine in the manner adopted in this case is an important matter within this Court's supervisory power such that review is justified. *Id.* In short, the decision of the court of appeals is important because it: (1) modifies the well-established doctrine of collateral estoppel; (2) restricts access to federal collateral relief; (3) implicates this Court's supervisory power; (4) will affect thousands of defendants who resolve their cases through plea agreements that contain appeal waivers but not § 2255 waivers; and (5) applies the new Litigation Bar retroactively to Mr. Linder, contrary to *Thomas v. Arn*, 474 U.S. 140, 145 (1980).[4] These are important matters applicable not only in the Fourth Circuit, but in all courts of appeals.

4. *See* Pet. at 28-29.

2. This Court also should grant a writ of certiorari to decide whether *Day v. McDonough*, 547 U.S. 198 (2006), applies to § 2255 petitions.

In response, the Government first asserts that there is no "division of authority in the court of appeals" on this issue such that a writ of certiorari is justified. However, in a number of cases, this Court has noted that a grant was justified based on the importance of the issue presented and, for example, "conflicting views in the courts of appeals and the district courts." *Calhoon v. Harvey*, 379 U.S. 134, 137 (1964). For instance, in *St. Martin Evangelical Lutheran Church v. South Dakota*, the Court cited but one federal district court decision, in addition to the decision of the Supreme Court of South Dakota, as contrary to seven state court rulings and one court of appeals decision, in support of the statement that certiorari was granted because of "the growing number of conflicting federal and state decisions on [a federal statutory] issue." 451 U.S. 772, 780 & n.10 (1981). Similarly, in *Heffron v. International Society for Krishna Consciousness*, this Court cited, among other things, four conflicting district court rulings. 452 U.S. 640, 646 & n.9 (1981). And, in granting certiorari in *Gulf Offshore Co. v. Mobil Oil Corp.* this Court identified the conflict as involving three state courts and two federal district courts. 453 U.S. 473, 477 & n.3 (1981).[5] Here, three lower court decisions, including two from courts of appeals

5. *See also Murphy Bros. v. Michette Pipe Stringing, Inc.*, 526 U.S. 344, 349 & n.2 (1999) (certiorari granted due to disagreement in "lower courts," citing conflict among three federal appellate courts and two federal district courts); *Massachusetts v. United States*, 435 U.S. 444, 453 (1978) (granting certiorari based solely on a conflict between a court of appeals decision and a single district court ruling, and noting two district court decisions).

and one from a district court, have stated that *Day* does not apply to § 2255 petitions, while two district court cases have applied *Day* 's holdings to § 2255 petitions. Pet. at 20-21. Given the importance of this issue and the conflict in lower court opinions, this Court should issue a writ of certiorari to resolve the matter.

Second, the Government asserts that this case does not present the *Day* issue. In this regard, the Government reads *Day* too narrowly. The facts in *Day* involved a district court *sua sponte* raising a statute of limitations defense in the face of a concession by a State that the § 2254 petition was timely. However, *Day* held, among other things, that a district court must apply a three-step test before exercising its discretion to recognize a defense waived by a State. Pet. at 20. *Day* is thus fundamentally about limiting the discretion of the federal courts to raise a waived defense.

Here, the court of appeals clearly did not apply *Day*, relying instead on an *ad hoc* collection of facts to excuse the Government's waiver of the Litigation Bar. As Judge Motz noted in dissent from the court of appeals' denial of rehearing *en banc*, the result is a decision that appears to set different rules for the Government than habeas petitioners:

> When habeas *petitioners* have sought to advance such defaulted arguments, this court has steadfastly refused to consider them. Allowing the Government to prevail on an argument that it defaulted seems to me the antithesis of the equal justice under law guaranteed by our Constitution.

Pet. App. at 29a (emphasis in the original).

This case thus presents an ideal vehicle for this Court to decide whether *Day*'s holdings apply in the § 2255 context.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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